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Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-266

In the Matter of

TELEPHONE COMPANY-
CABLE TELEVISION
Cross-Ownership Rules,
Sections 63.54-63.58

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: July 16, 1992; Released: August 14, 1992

By the Commission:

1. In this *Memorandum Opinion and Order*, we grant the Petition for Reconsideration or Clarification of the *First Report and Order* in this proceeding filed by General Telephone Companies (GTE) to the extent we clarify and affirm our previous conclusion that a local telephone company[1] does not need to obtain a cable television franchise to offer video dialtone.

I. BACKGROUND

2. Under Section 621(b) of the Cable Communications Policy Act (Cable Act or Act), a cable operator is generally required to obtain a cable television franchise in order to provide cable service.[2]

3. In October 1991, we adopted a *First Report and Order*, in which we issued an interpretive ruling addressing the applicability of cable television franchise obligations to a local telephone company providing service pursuant to the video dialtone policy that we proposed at the same time.[3] We there concluded that the statute would not impose a franchise requirement upon a local telephone company providing service under the video dialtone framework because that carrier "would not be providing cable service'" and thus would not be a "cable operator" as the Act defines that term.[4]

4. The Cable Act classifies an entity as a "cable operator" if it meets one of two conditions: (1) the entity provides cable service over a cable system in which it owns a significant interest or (2) it otherwise controls, or is responsible for the management and operation of, a cable system.[5] We noted that rather than providing cable service, a local telephone company providing video dialtone service would act only as a conduit that enabled its programmer customers to provide video programming to subscribers.[6]

5. On January 16, 1992, GTE filed a Petition for Reconsideration or Clarification of the interpretive ruling in the *First Report and Order* on the limited issue of whether a local telephone company offering video dialtone service may need a cable television franchise. Six parties have filed in response to that petition.[7] The majority of parties support the Commission's conclusion although some state that our decision would benefit from a fuller exposition of the reasoning underlying it.

6. This *Memorandum Opinion and Order*, which addresses only issues raised in the Petition filed by the GTE, reaffirms our conclusion that Section 621(b) of the Cable Act does not require local telephone companies providing video dialtone service under our regulatory framework to acquire a cable franchise from their local franchising authorities. We thus grant GTE's Petition to the extent we clarify the reasoning that underlies this conclusion.

II. PETITION AND COMMENTS

7. In its Petition, GTE focuses upon our statement that a local telephone company providing video dialtone service would not come within the definition of a "cable operator" subject to the franchise requirement of Section 621(b). It notes that we do not discuss why a local telephone company would not meet the second test for being classified as a cable operator, namely that it "otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system."[8] Turning to the definition of cable system set forth in

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[1] The term "local telephone company," as used herein, refers to local telephone exchange carriers.

[2] 47 U.S.C. § 541(b). The only cable operators excused from complying with this requirement are those "lawfully providing cable service without a franchise on July 1, 1984, unless the franchising authority so requires."

[3] 7 FCC Rcd 300 (1991). The *First Report and Order* was issued in combination with a *Further Notice of Proposed Rulemaking (FNPRM)* and a *Second Further Notice of Inquiry (SFNOI)*.

[4] 7 FCC Rcd at 325-26, para. 50. The *First Report and Order* also concluded that the customer-programmers of video dialtone service are not required to obtain a cable television franchise and that the ban on telephone company-cable television cross-ownership did not apply to interexchange carriers and should be interpreted to apply only to local exchange carriers that own or control facilities through which they provide local exchange service. *Id.* at 323, para. 46. No one has sought reconsideration or clarification of these conclusions.

[5] 47 U.S.C. § 522(4)(A), (B).

[6] 7 FCC Rcd at 327, para. 51.

[7] In response to the GTE petition, the Ameritech Operating Companies (Ameritech) filed comments; the BellSouth Corporation (BellSouth) filed an opposition; the National Cable Television Association and the Community Antenna Television Association (herein NCTA) filed a joint response; the National Telecommunications and Information Administration (NTIA) filed a partial opposition; and the United States Telephone Association (USTA) filed a statement. Bell Atlantic Telephone Companies and GTE both filed replies to comments on the GTE reconsideration petition. The Board of Directors of the Metropolitan Area Communications Commission located in Beaverton, Oregon (Beaverton); the Board of Directors of Multnomah Community Television (Multnomah); and the City of Portland, Oregon (Portland) all filed untimely petitions for reconsideration. We will treat all of these late filings as informal comments which we will consider in the interest of achieving a complete record on the issue raised in the GTE petition.

[8] 47 U.S.C. § 522(4)(B).

Section 602 of the Cable Act.[9] GTE urges the Commission to interpret that definition so that video dialtone facilities "used in the transmission of video programming directly to subscribers" constitute a cable system only if the entity using the facilities for such transmission is the video dialtone provider itself.[10]

8. The majority of the parties strongly support the Commission's conclusion that no franchise obligation attaches to the offering of video dialtone service. BellSouth and Ameritech observe that, as soon as it is established that the carrier is not providing cable service, whether the carrier is a cable operator or its facilities comprise a cable system becomes irrelevant.[11] They assert that under Section 621(b), no franchise obligation attaches. NTIA and USTA, however, urge the Commission to expand and refine the reasoning underlying its conclusion concerning franchise obligations in a video dialtone environment to further justify its conclusion.[12] NTIA contends that local telephone companies offering video dialtone do not need a cable franchise because they are not providing "cable service" and recommends that the Commission justify its conclusion with a more detailed examination of the Cable Act.[13] USTA asks that we clarify our analysis and find that a local telephone company network is not a "cable system" and is not designed to provide "cable services."[14] In reply comments, adopting the USTA rationale, Bell Atlantic asserts that a video dialtone provider is neither the provider of cable services nor a cable operator. In its reply comments, GTE urges the Commission either to select one or more of the supportive rationales set forth in the comments and make it the basis for its reconsideration decision or to defer a ruling on video dialtone carriers' franchise obligations.

9. On the other hand, NCTA asserts that the Commission's interpretation of the Cable Act is fatally flawed and that local telephone companies offering video dialtone are required under the Cable Act to secure a cable television franchise. It maintains that under the Cable Act, a local telephone company offering video dialtone would be a "cable operator" and that the facility it operates would be a "cable system."[15] Portland states that the Commission's conclusion is inadequately analyzed and does not accord with law or sound public policy. Beaverton and Multnomah, filing identical form letters, state that the decision improperly ignores the role of local governments.

III. DISCUSSION

10. In the *FNPRM*, we proposed to permit a mode of delivering video programming to the public that the drafters of the Cable Act had not contemplated. This new option, which we call video dialtone, would separate control over the creation, selection, and ownership of video programming from control over the facilities linking the program supplier and each of its individual viewers or "subscribers. " This separation was designed to comport with the prohibition of Section 613(b) of the Cable Act against telephone companies providing video programming directly to subscribers in their telephone service areas.[16]

11. Upon review, we still find our conclusion consistent with both the language and legislative history of the Cable Act. We find that Congress did not intend to require that an entity obtain a cable television franchise when it is not providing video programming directly to subscribers and that to impose such a requirement would conflict with practice in existence at the time the Cable Act was passed. In enacting Section 621 of the Cable Act, Congress was primarily concerned with the use of public streets and rights-of-way by cable television operations and the ability of state and local entities to regulate such use. In contrast to cable operators, local telephone companies already receive authorization to use the public rights-of-way pursuant to common carrier regulation. Consequently, there is no basis to infer that Congress intended that local telephone companies secure a cable television franchise to use the same rights of way they are already authorized to use, especially when the telephone company is not using those rights-of-way to provide video programming directly to subscribers and there would be no incremental burden on those rights-of-way. Further, requiring a cable television franchise for the offering of common carrier services by local telephone companies would be contrary to longstanding FCC practice whereby local telephone companies are able to provide "channel services" without a local cable television franchise. Congress gave no indication that it wished to change the *status quo* in this respect. Rather, Congress only sought to require a cable television franchise when a telephone company is providing video programming directly to subscribers, such as is permitted under waiver or pursuant to the rural exemption.

12. We believe, however, that a more complete explanation of the reasoning underlying this conclusion would provide a firmer foundation on which to rest our video dialtone policies. Accordingly, we are granting the GTE petition to the extent that we will now elaborate upon our holding in the *First Report and Order*. In the next Section, we clarify why telephone companies providing video dialtone service would not be providing "cable service." In Section B, as another independent basis for our conclusion, we clarify why telephone companies' video dialtone facilities would not comprise a "cable system."

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[9] The Act defines a "cable system" (in relevant part) to be:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include ... (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of th[e Communications] Act, except to the extent that such a facility is used in the transmission of video programming directly to subscribers....

47 U.S.C. § 522(4).

[10] GTE Petition for Reconsideration at 3-4.

[11] BellSouth Opposition at 2; Ameritech Comments at 3.

[12] *See* USTA Statement at 2, 10; NTIA Partial Opposition at i-ii, 2-3.

[13] NTIA Partial Opposition at 4.

[14] USTA Comments at 6-7.

[15] NCTA Comments at 3-6.

[16] 47 U.S.C. § 533(b)(1).

A. **Video Dialtone Service is not Cable Service.**

13. The Cable Act defines cable service to be:

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service.[17]

14. NCTA asserts that when others use telephone company video dialtone facilities to transmit video programming directly to the public, the telephone company itself is providing a cable service. It argues that this type of distribution constitutes "transmission" by the telephone company of video programming and thus would engage the telephone company in the provision of "cable service." We do not agree with this reading of the Cable Act, which would have consequences clearly unintended by, indeed contrary to the intent of, the drafters of the Act.

15. The term "transmission" is not defined in the Cable Act and the intended scope of the definition is ambiguous. We conclude, however, that adopting NCTA's interpretation would upset the well-established regulatory scheme whereby the FCC exclusively regulates telephone company construction and lease of video distribution facilities to cable operators.[18] Since 1969, the Commission has continued to require telephone companies to obtain authorization under Section 214 of the Communications Act before undertaking such construction. To interpret the Cable Act as NCTA urges would engage state and local authorities, through the cable franchise process, in reviewing a telephone company's proposal to construct interstate common carrier transmission facilities used only to provide channel service to a cable operator. Yet there is nothing in the legislative history to suggest that Congress desired such a result.

16. We believe that it is more consistent with Congressional intent to interpret the term "transmission" as requiring active participation in the selection and distribution of video programming. Such an interpretation is also a reasonable reading of the language of the statute. Under the Cable Act, a cable franchise is only required by a cable operator providing "cable service." The legislative history of the Cable Act makes clear that in adopting the definition of "cable service," Congress intended to exempt from common carrier regulation video programming and services sufficiently like video programming provided over a cable system.[19] The concern of those drafting the Cable Act was thus not that a common carrier would somehow escape cable franchise regulation, but rather that a cable operator would be subjected to common carrier regulation. [20] Congressional concern was that such regulation could impede the cable industry's ability to bring video service to the public.[21]

17. Indeed, the legislative history indicates that Congress did not intend to limit the ability of telephone companies to offer non-video services or affect federal regulation of such services.[22] The legislative history explicitly states that: "nothing in this section shall be construed to limit telephone company provision of information services or other non-video programming, transmissions or communications services."[23] Under the video dialtone proposal, the necessary transmission and switching facilities linking the viewer and the programmer would be offered under tariff on a traditional common carrier basis. The additional functionalities that might be provided under the video dialtone regulatory framework, *e.g.*, a directory, simple scroll capability or more sophisticated options for determining which programmer to call, fall within the category of information services that the Cable Act recognized telephone companies could provide without a franchise. The *FNPRM* proposal would treat these features and services as either basic common carrier or enhanced services, as consistently defined by the Commission since the *Computer II* decision in 1980.[24] There is no indication that Congress intended to affect or alter this regulatory structure by additionally imposing Title VI Cable Act requirements upon these activities.

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[17] *Id.* § 522(5)(A), (B).

[18] GTE of California, 13 FCC 2d 488 (1968), *aff'd sub nom.* GTE of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969).

[19] H. R. Rep. No. 934, 98th Cong., 2d Sess., at 41 (1984) [hereinafter *House Cable Report*].

[20] *Id.* at 59-62.

[21] *Id.* at 29.

[22] *Id.* at 57.

[23] *Id.* Thus, we find that Congress did not intend that the mere provision of "other programming services" would necessitate that a local telephone company obtain a cable television franchise. To find otherwise would mean, for example, that Prodigy or Compuserve, or a local telephone company offering textual information services such as news or stock listings, would need a cable franchise. *See, e.g.*, The Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Gateway Service, Memorandum Opinion and Order, DA 88-1512 (1988). We conclude that to so find would conflict with the intent of Congress not to limit the provision of such services or alter the existing regulatory scheme with respect to such services. *House Cable Report, supra* note 19, at 57.

[24] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (*Computer II*), *modified on recon.*, 84 FCC 2d 50 (1980), *modified on further recon.*, 88 FCC 2d 512 (1981); Amendment of Section 64.702 of the Commission's Rules and Regulations, Phase I, Report and Order, 104 FCC 2d 958, 1012-18 (1986) (*Computer III* or *Phase I Order*), *recon.* 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *Phase II Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571, 7580 (1991) (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending*, California v. FCC (9th Cir. Feb. 14, 1992) (No. 92-70083, consolidated on June 2, 1992 with MCI v. FCC, No. 92-70186, NY v. FCC, No. 92-70217, ANPA v. FCC, No. 92-70261); California v. FCC (9th Cir. Feb. 21, 1992) (No. 92-70105, consolidated on June 2, 1992 with NYPSC v. FCC, No. 92-70281).

18. Thus, we agree with NTIA that the more reasonable interpretation of the word "transmission" requires active participation in the selection and distribution of that video programming.[25] It is our interpretation of the Act and its legislative history that Congress intended for an entity to be required to obtain a cable television franchise only when that entity selects or provides the video programming to be offered-functions foreclosed to the telephone company under the video dialtone policy we adopt today in a companion order.[26] If an entity is not providing video programming directly to. subscribers, we find that Congress did not intend for it to be subject to the local cable television franchising process.

19. Consequently, we reject the interpretation of the term "transmission" proposed by NCTA. We conclude that under the terms of the Cable Act, a telephone company offering video dialtone would not be providing one-way "transmission" to subscribers of video programming and would therefore not be providing "cable service." We find that our reading of the definition of "cable service" is not only logical, but also consistent with legislative intent. As a result, video dialtone providers incur no obligation to obtain a cable franchise.

B. Local Telephone Companies Providing Video Dialtone Services are not Cable Operators.

20. In response to GTE's petition and as an independent basis for our ruling on the franchise requirement, we now set forth our interpretation of the Cable Act that local telephone companies providing video dialtone are not "cable operators."[27] As noted above, under the Cable Act, an entity may be a cable operator for one of two reasons. First, it may "provide cable service over a cable system in which it directly or indirectly owns a significant interest."[28] Second, an entity may also be classified as a cable operator if it "otherwise controls or is responsible for the management and operation of such a cable system."[29] As explained below, because a video dialtone facility is not a "cable system," neither of the alternative cable operator definitions are satisfied.

21. The Act defines a "cable system" to be "a facility consisting of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming."[30] Exempted from this definition is "a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act."[31] The Act creates an exception to the exemption for the telephone company facilities to the extent that such "facilit[ies are] used in the transmission of video programming directly to subscribers."[32] As the comments filed in response to the GTE petition make clear, the language defining the exception to the exemption is ambiguous.[33]

22. We conclude, first, that local telephone company facilities used to provide video dialtone service qualify for the common carrier exemption to the "cable system" definition. These facilities would all be governed by common carrier regulations that incorporate the same concerns about public safety and convenience and use of public rights-of-way that provide a key justification for the cable franchise requirement.[34] Since these concerns are already addressed by the existing common carrier regulatory scheme for telephone company facilities, we conclude that Congress did not intend to subject telephone companies to the duplicative regulation that would occur if we were to find that a cable franchise is also required for video dialtone facilities. # [35] Moreover, the facilities used to provide video dialtone services would be subject in whole or in part to Title II regulation, as they would be used to provide basic interstate services. Thus, while the statutory language is not precise, to the extent Congress expressed any intent regarding the existing regulatory requirements for common carriers, that intent was that the Act not alter existing regulatory authority.[36]

23. Second, we conclude that the exception to the common carrier exemption for facilities "used in the transmission of video programming directly to subscribers" applies only when a local telephone company is acting like a cable operator by providing cable service. Thus, to the extent a telephone company is explicitly permitted by the Cable Act to provide video programming directly to subscribers (*e.g.*, subject to waiver or the rural exemption),[37] it falls within the regulatory scheme set forth in the Cable Act, including the requirement that it obtain a cable television franchise. On the other hand, an entity not providing video programming directly to subscribers, including a local telephone company offering video dialtone (that is prohibited from providing video programming directly to subscribers), would be exempt from such regulation.

24. We conclude further that video dialtone facilities typically would not constitute a "cable system" for the additional reason that they will not ordinarily include the necessary signal generation, reception and control equipment. As a video dialtone provider, a telephone company

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[25] NTIA Partial Opposition at 6 n.16.

[26] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-266, adopted July 16, 1992 (FCC 92-327).

[27] We believe that the lack of "cable service" is a sufficient basis to conclude that Section 621(b) is inapplicable to local telephone companies offering video dialtone, whether or not they are "cable operators." From this earlier analysis, it also follows that because a local telephone company providing service pursuant to the video dialtone framework is not offering cable service, it does not satisfy this first alternative "cable operator" definition.

[28] 47 U.S.C. § 522(4)(A).

[29] *Id.* § 522(4)(B).

[30] *Id.* § 522(6).

[31] *Id.* § 522(6)(C).

[32] *Id.*

[33] *See, e.g.*, NTIA Partial Opposition at 11-12.

[34] *See, e.g.*, Section 621(a) (granting cable system franchisees authorization to use public rights-of-way and easements for construction of the cable system); *House Cable Report, supra* note 19, at 59. *Cf.* Beach Communications, Inc. v. FCC, No. 91-1089, slip op. at 4 n.3 (D.C. Cir. June 9, 1992) ("[T]he fact that cable television uses public rights of way has been the predominant rationale for local franchising.").

[35] *See, e.g.*, BellSouth Opposition at 4; Ameritech Comments at 5.

[36] *House Cable Report, supra* note 19, at 57, 60.

[37] 47 U.S.C. § 533.

generally will not control this "headend equipment," which is associated with selection and provision of video programming. It will be the video programmers, rather than the telephone company, who will generate and control the signal sent over transmission facilities made available by the telephone company.[38] As long as the facilities are not used by the telephone company for the direct provision of video programming, the system does not qualify as a cable system.

25. For these reasons, we find it more reasonable to read the exception to the exemption for facilities subject in whole or in part to Title II regulation to apply only in the limited circumstances in which the Cable Act permits a telephone company to provide video programming directly to subscribers. Thus, we conclude that the facilities a local telephone company uses to offer video dialtone service do not constitute a "cable system." Consequently, even if the offering of video dialtone were somehow construed as constituting "cable service," the telephone company would not meet either criterion for classification as a "cable operator."

IV. ORDERING CLAUSE

26. Accordingly, IT IS ORDERED that GTE's Petition for Reconsideration is GRANTED TO THE EXTENT DISCUSSED HEREIN and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[38] Moreover, telephone company "headend"-type equipment used to provide enhanced services other than video programming (like videotext) would trigger no franchise obligation. This would be the case because a facility, including headend equipment, is a "cable system" only to the extent that it includes the transmission of video programming directly to subscribers.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-347

In the Matter of
Amendment of Part 73 of the
Commission's Rules to Modify
Processing Procedures for
Commercial FM Broadcast
Applications

REPORT AND ORDER

Adopted: July 16, 1992; Released: July 27, 1992

By the Commission:

1. By this *Report and Order*, the Commission modifies the strict "hard look" approach used to process applications for the construction of commercial FM radio stations. The modification will apply to applications in the commercial FM band filed on or after, August 7, 1992.[1] As the result of this modification, applicants whose filings would otherwise be dismissed for defects in essential information will have the opportunity to avoid dismissal by correcting all such defects. This more lenient approach, which received enthusiastic support from the commenters in this proceeding, is possible due to recent changes in the quality and quantity of commercial FM applications and the Commission's adoption of other measures to discourage speculation in broadcast proceedings.

BACKGROUND

2. The Commission first implemented the "hard look" approach in 1985.[2] At that time, the Commission was receiving a high percentage of carelessly prepared and speculative applications and the staff's acceptance of curative amendments was causing significant delays in processing. The Commission needed to address these problems if the staff was to handle with reasonable speed a dramatic increase in the number of FM applications expected from the allotment of 689 new FM channels in Docket 80-90.[3] Accordingly, the Commission adopted the "hard look" approach, imposing a rigorous standard for acceptable applications and providing extremely limited opportunity for curative amendment of defects. Under the "hard look," an application must contain specific types of information by the close of the applicable filing periods or our staff will return it to the applicant without any opportunity for corrective amendment.

3. The "hard look" worked well to achieve its intended purposes of encouraging complete applications, reducing processing delays, and weeding out the hastily prepared applications of speculators. The "hard look" was criticized, however, for its harshness on applicants. An oversight, such as failure to check a box on the application form, could result in dismissal of an application without a chance to amend. The Commission recognized at the outset this disadvantage of the "hard look" system, but concluded that the system's benefits at the time outweighed the associated costs. *See Hard Look Order*, Appendix D, 50 Fed. Reg. at 19945.

4. By late 1991, however, circumstances had changed. The volume of new FM applications received had decreased substantially and the backlog of pending applications was the lowest in almost 15 years. Application quality was greatly improved, with the Commission returning approximately 5% as defective, as opposed to 40% returned prior to the "hard look. " Moreover, the Commission had, in other proceedings, addressed the problem of speculation through other more direct actions.[4] Given these changes, we concluded that it might be possible to return to a more flexible FM processing system without introducing significant processing delays or unduly burdening the staff. Accordingly, the Commission adopted a *Notice of Proposed Rule Making* in this proceeding, proposing more lenient standards for amendment and acceptance of defective commercial FM applications. *Notice of Proposed Rule Making*, Processing Procedures for Commercial FM Broadcast Applications, MM Docket No. 91-347, 6 FCC Rcd 7265 (1991) (*Notice*). In response to the *Notice*, the Commission received 11 comments and 6 reply comments from communications trade associations, legal and engineering counsel, and individual applicants. A list of

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[1] Today's action will apply to non-commercial educational entities only to the extent that they apply for channels in the commercial FM band. It will not affect non-commercial educational applicants in the "reserved" (noncommercial) FM band because that band has never been subject to "hard look" requirements. Our action in this proceeding is not intended to reflect a change in our licensing policies for other services. *See, e.g., Selection of Mutually Exclusive Competing Cellular Applications*, CC Docket No. 83-1096, 50 Fed. Reg. 20760 (May 20, 1985) (cellular "letter perfect" standard).

[2] *See Report and Order*, MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) (*Hard Look Order*), *recon. denied* 50 Fed. Reg. 43157 (October 24, 1985), *aff'd without opinion sub nom., Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987). The *Hard Look Order* is reprinted at 58 RR 2d 776 (1985). Appendix D to the *Hard Look Order*, which was also issued separately as a Public Notice, is reprinted at 58 RR 2d 166 (1985).

[3] *See Report and Order*, BC Docket No. 80-90, 94 FCC 2d 152 (1983) *implemented in First Report and Order*, MM Docket No. 84-231, 50 Fed. Reg. 3514 (January 25, 1985).

[4] For example, the Commission limited monetary settlements, required early payment of substantial hearing fees, and required additional information related to applicants' financial qualifications. *See Report and Order*, Settlement Agreements, MM Docket No. 90-263, 6 FCC Rcd 85 (1990), *modified in part, Memorandum Opinion and Order*, MM Docket 90-263, 6 FCC Rcd 2901 (1991); *Report and Order*, Proposals to Reform the Commission's Comparative Hearing Process, GEN Docket No. 90-264, 6 FCC Rcd 157 (1990), *recon. granted in part and denied in part, Memorandum Opinion and Order*, GEN Docket No. 90-264, 56 Fed. Reg. 25635 (June 5, 1991); *Report and Order*, Revision of Application for Construction Permit, GEN Docket No. 88-328, 4 FCC Rcd 3853 (1989), *recon. denied, Memorandum Opinion and Order*, GEN Docket 88-328, 5 FCC Rcd 7267 (1990).

parties participating in this proceeding and the acronyms we use to identify them appears in Appendix A. We discuss below the commenters' views and our conclusions.

DISCUSSION

5. All of the commenters in this proceeding support the overall objective of our proposal, agreeing that the time has come for a return to more lenient acceptance and amendment standards for commercial FM applications.[5] They say that the "hard look" made it necessary for legal and engineering counsel who prepare FM applications to add more layers of pre-filing review to avoid even the smallest mistake. *See* Comments of Glaser at 5. They believe that this raised the cost of applying for commercial FM stations beyond the reach of smaller applicants. *Id.* at 4-5. Commenters also maintain that more lenient processing procedures will serve the public interest by including in the comparative process all qualified applicants, especially those sincere in their desire to serve a particular community but without the expertise to detect highly technical errors. *See* Comments of CDE at 2; Comments of FCBA at 3-4. Finally, they point out that many "hard look" errors are easily correctable. Upon our consideration of the comments, and given that changes in the quality and quantity of commercial FM applications now make it administratively possible to accommodate some degree of error or omission in these applications, we believe that the benefits of retaining the current "hard look" system no longer justify its costs.[6] Accordingly we shall modify the "hard look" system.[7]

Processing Procedures

6. The *Notice* made clear that the Commission does not by this proceeding intend to change the overall filing procedures and policies applicable to the commercial FM service but only the manner in which we handle defective FM applications.[8] The *Notice* set forth for public comment several alternative procedures that would be more tolerant of defects than our current system. We then tentatively narrowed the field of options down to two that are similar in many respects. Both options would retain the Commission's current criteria for determining an FM application's "tenderability" (*i.e.* substantial completeness)[9] and "acceptability" (*i.e.* compliance with core legal and engineering requirements).[10] Unlike current procedures, however, the new options would enable applicants to avoid dismissal by giving them a limited opportunity, outside of established amendment of right periods, to correct otherwise fatal defects in tender and acceptance information. Option 1 would give applicants one opportunity to amend defects at the tender stage and one opportunity to amend at the acceptance stage. Option 2 would combine these two stages of review and give the applicant one overall opportunity for corrective amendment in response to a staff deficiency letter. Applicants failing to correct all tender and acceptance defects within the limited opportunity proposed would be dismissed without further opportunity to amend.

7. Of the commenters addressing a specific option, most favor Option 2.[11] They believe that Option 2's combined opportunity to correct tender and acceptance defects would streamline our commercial FM processing system. They also maintain that separate tender and acceptance stages of review would no longer be necessary if applicants are given the opportunity for corrective amendment. Com-

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[5] Several commenters supportive of our objective contend that the "hard look" was promulgated and/or applied in an arbitrary manner and that this should form the basis for any modification. We reject this notion. We will not use this proceeding to revisit Commission and court decisions finding the "hard look" valid or to rule on the appeals of individual applicants dismissed for failure to comply with "hard look" criteria.

[6] Two commenters point out that the Association of Federal Communications Consulting Engineers (AFCCE) filed a Petition for Rule Making in April 1989 suggesting that the time was then ripe to relax the "hard look" processing system. Comments of AFCCE; Comments of duTreil. The Commission did not act upon AFCCE's Petition in 1989 because circumstances had not yet changed sufficiently to reduce the need for the "hard look." Although the filing windows for Docket 80-90 channels had closed by that time, the backlog of pending applications and demands on our processing staff were still very high. Furthermore, the Commission had not yet implemented other methods to curb speculation. As we did not formally dismiss AFCCE's Petition at the time it was filed, and as our action today renders that Petition moot, we shall dismiss it herein. We note, however, that AFCCE resubmits its Petition as a comment in this proceeding and we shall consider it as such.

[7] The National Association of Broadcasters (NAB) requests that we withhold any action in this proceeding pending consideration of its February 10, 1992 Petition for Rule Making. While NAB generally supports our proposal to modify the "hard look," it believes that the Commission should undertake a much broader review of FM allotment policies. We do not believe that consideration of NAB's Petition justifies a delay of action in the present proceeding. Should the Commission find merit to NAB's proposals, we can take appropriate action separately.

[8] *Notice*, 6 FCC Rcd at 7270, n.11. For example, we noted that our "window" filing and first come, first served policies have worked well and will be retained. For an in-depth discussion of current commercial FM processing procedures see *Notice*, 6 FCC Rcd at 7265. *See also* 47 C.F.R. Sections 73.3564(d) and 73.3573.

[9] "Tender" requirements include such factors as the applicant's name and address, channel number and community of license, certifications of compliance with alien ownership restrictions, local public notice provisions, financial ability to construct and operate, and site availability; listing of other interests in broadcast facilities; engineering data such as geographic coordinates, transmitter site map, power levels, and antenna height; and the applicant's signature. *See Hard Look Order*, Appendix D, 50 Fed. Reg. 19945, *reprinted at* 58 RR 2d 166 (1985). Although we are making no changes to the criteria specified in Appendix D, we are reprinting it in its entirety as Appendix D to this *Report and Order* to make it more accessible to applicants and other interested parties.

[10] "Acceptance" criteria include such factors as the application's compliance with international treaties and adherence to Commission rules involving power, height, and spacing. *See Public Notice*, Patently Defective AM and FM Construction Permit Applications, 49 Fed. Reg. 47331 (December 3, 1984). Compliance with policies on alien ownership and control have also been deemed "acceptance" criteria. *See PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988).

[11] While two commenters favor Option 1, they do not identify any perceived advantages of that system or any perceived disadvantages of Option 2. Comments of CDE; Comments of AFCCE.

ments of Glaser at 6; Comments of FCBA at 6. Finally, they support Option 2 because its opportunity for corrective amendment closes prior to designation of competing applications for hearing, in contrast to Option 1 which proposed correction of "acceptance" defects after hearing designation. The commenters believe that competing applicants should not have to split their efforts between evaluating corrective amendments and making hearing plans. Comments of Mullaney at 2.

8. We believe that Option 1 and Option 2 are both viable alternatives. Both would give applicants an opportunity to correct defects, where there had previously been none. Neither option would be so lenient as to cause a return of FM application quality to its poor pre-"hard look" levels. We select Option 2 as our preferred option, however, because its combination of tender and acceptability review will streamline our procedures, helping to offset some of the extra work that consideration of corrective amendments will present for our staff. In addition, Option 2 will generally narrow the time frame in which competing applicants need to evaluate corrective amendments. Accordingly, we conclude that of the alternatives proposed in the *Notice*, Option 2 strikes the best balance between the needs of applicants and of the Commission. We shall adopt this option, as modified herein, as the framework for our modified processing approach.

9. Under the option adopted, we will continue to require applicants to meet existing "tender" and "acceptance" criteria, but will give applicants additional opportunities to correct deficiencies. Specifically, there will be three distinct stages during which an applicant may amend tender and acceptance information after the close of a filing window.[12] The first stage is a 30-day amendment-as-of-right period triggered by the issuance of a "Notice of Tender" listing the application.[13] At this stage, the applicant will be able to make any amendments that it wishes as long as the resulting changes are "minor," *i.e.*, not changing the original community or channel, and if the amendment does not alter the proposed facility's coverage area so as to produce a conflict which did not previously exist. *See* 47 C.F.R. Sections 73.3522(a)(6) and 73.3573(a). Amendments filed during this first stage can be purely voluntary and need not correct a defect. Immediately following the amendment of right period a second stage will begin. This second stage will continue until the end of a 30-day period specified in a staff deficiency letter.[14] Amendments during this second stage will be limited to two types. First, applicants will be able to amend upon a traditional showing of good cause or as otherwise provided in our rules. *See* 47 C.F.R. Sections 1.65, 73.3522(a)(6), and 73.3514; *see generally Erwin O'Connor Broadcasting Co.*, 22 FCC 2d 140, 143 (1970) (good cause criteria). In addition, for this limited period, the staff will also treat as good cause amendments those that successfully and directly [15] correct tender or acceptance defects.[16] Applicants will be able to submit one or more such corrective amendments during this second stage.[17] Upon the end of the period for corrective amendment specified in the deficiency letter, a third stage will begin. At this third stage there will be no further opportunity for amendment without a traditional showing of good cause or as otherwise provided in our rules. Applications with uncorrected tender or acceptance defects remaining at this stage will be dismissed.

Minimum Filing Requirements

10. The *Notice* expressed concern with the quality of applications that would be filed under more lenient processing rules. To discourage a significant decrease in application quality and to minimize the increased burden on our processing staff, we proposed to adopt minimum filing requirements. Applications meeting such minimum re-

[12] We note that an amendment filed during any of these stages may create a conflict between the application, as amended, and an earlier filed petition for rule making seeking to amend the FM Table of Allotments. In a concurrent action, we adopted cut-off rules protecting applications from conflicting rule making petitions as of the date that the application is protected from competing applications. *See Report and Order*, MM Docket 91-348, 7 FCC Rcd _____ (adopted July 16, 1992). We also stated, however, that if an application is amended in a manner that creates a conflict with a rule making petition already on file, then the application, as amended, should not be able to take advantage of its original cut-off date from rule making petitions. Rather, the amended application will be considered as if filed on the date of the amendment for purposes of applying the cut-off rule. We note that this approach parallels our treatment of application amendments that conflict with earlier filed applications. Such amendments generally are not governed by the original application filing priority if they conflict with an application filed before the amendment. *See* 47 C.F.R. Section 73.3522(a)(6).

[13] A "Notice of Tender" will no longer signify, however, that the applications included on that Notice meet all "tender" criteria. Rather it will indicate that the listed applications have satisfied the new minimum filing requirements which we adopt today and discuss below. *See* paras. 10-16 *infra*. With a single exception, the minimum filing requirements are simply a substantially reduced subset of our existing tender criteria. The staff will also continue to issue "Notices of Acceptance." These Notices will not indicate compliance with our acceptance criteria, but will continue to serve as the mechanism for permitting petitions to deny.

[14] In the event that a deficiency letter never issues prior to designation of an application for hearing and a tender or acceptance defect is discovered at the hearing stage, the Administrative Law Judge will provide the applicant one opportunity to correct all tender and acceptance defects.

[15] For example, an applicant seeking to correct an error in power must do so by changing its power -- not by changing its site -- unless some involuntary circumstance, such as loss of site, would independently establish a traditional showing of good cause. Amendments that do not directly and successfully correct tender and acceptance defects will be returned.

[16] Any changes made after the amendment of right period will be considered under our current policies which do not permit the applicant to gain additional comparative credit at the hearing stage from such amendments. *See Women's Broadcasting Coalition, Inc.*, 59 RR2d 730, 732-33 (1986), *aff'd by judgment sub nom., Plantation Broadcasting Corp. v. FCC*, 812 F.2d 1443 (D.C. Cir. 1987).

[17] This procedure varies slightly from our original proposal. We had proposed to limit applicants to only one opportunity for corrective amendment within the 30-day period following issuance of a deficiency letter. However, we also proposed to permit applicants to correct, on their own, deficiencies that the applicant discovers prior to the staff's issuance of a deficiency letter. The procedure adopted herein extends the number of permissible corrective amendments in the 30-day period, to allow for the possibility that deficiency letters and applicant-initiated amendments might cross in the mail.

quirements might contain less information than necessary for the staff to process an application but would nevertheless demonstrate that the applicant made a reasonable effort to provide us with basic information. We stated that applications not meeting minimum requirements would be returned without an opportunity for amendment. We requested public comment on whether to adopt minimum requirements and, if so, what information should be necessary.

11. Several commenters address the issues of application quality and minimum filing requirements. The FCBA believes that application quality will not decrease significantly under our new system. It argues that our system provides a strong incentive for applicants to use extreme care in initial preparation. Comments of FCBA at 6-7. In contrast, Mullaney believes that application quality may deteriorate to the point where "nearly blank" applications are submitted unless we adopt minimum filing requirements. Mullaney suggests that, at a minimum, applications should include the applicant's name, address, and the engineering and legal sections of the application with "no more than one item missing from each section." Comments of Mullaney at 1-3. AFCCE takes a mid-ground position, proposing that applications should contain certain elements that it believes are particularly crucial for staff processing, but without concluding that inclusion of these elements will affect overall application quality. According to AFCCE an application should contain a "majority" of the following engineering entries: channel number, community, coordinates, power, radiation center, and height above mean sea level.[18] Comments of AFCCE at 6.

12. We conclude that minimum filing requirements are important to the integrity and success of our new FM approach.[19] As AFCCE points out, there is an administrative necessity that all applications contain certain essential information when filed. Also, as Mullaney notes, we need to prevent the submission of applications so deficient as to abuse our processes. We are convinced that a minimum filing requirement is essential to address these concerns. Accordingly, we are adopting a two-tiered minimum filing requirement for applicants applying for commercial FM frequencies. The minimum filing requirement is based on, but is more lenient than, our tender requirements. In this regard, we wish to be clear that the new minimum requirement in no way permits the same level of processing as our tender and acceptance criteria, nor does it replace those criteria. The minimum filing requirement is simply an easier threshold that, given the current FM environment, we have decided to apply at the initial stage. Applications that do not meet the threshold are so deficient that they do not merit the expenditure of further resources to allow them the opportunity to bring their applications into compliance with the current tender and acceptance criteria.

13. Under the first tier of our minimum filing requirement, we will require applications to contain six specific items that are absolutely essential to the staff at the initial stage: (1) applicant's name and address; (2) applicant's original signature[20] (3) principal community; (4) channel or, frequency; (5) class of station;[21] and (6) transmitter site coordinates. Without this information the staff could not perform even the most basic of functions such as contacting the applicant, being sure that the applicant authorized the filing, grouping mutually exclusive applications together, or entering basic information into a data base. Applications omitting any of these six items will be returned to the applicant with no opportunity for corrective amendment.

14. We also believe that an additional safeguard is needed because an application could contain each of the six items described above yet still be seriously deficient overall. Consideration of applications falling so far short of our "tender" requirements for substantial completeness could well result in the abuse of our processes whereby applicants submit skeletal applications and amend these submissions with information copied from their competitors. To prevent abuse of our processes, we will incorporate a second tier into our minimum filing requirement. We will return without opportunity for amendment applications that omit more than three of the second tier items listed in Appendix C of this *Report and Order*.[22] In our experience, it is unusual for applications to contain more than two such omissions under the current "hard look" approach. Therefore, setting a limit at three omissions appears both reasonable and fair.

15. In sum, we establish as a minimum filing requirement that all commercial FM applications must: (1) contain the six specific items identified above, *and* (2) omit no

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[18] Another commenter, duTreil, suggests that applications for new facilities should not have to include any engineering information, arguing that technical issues rarely draw meaningful distinctions between applicants in the comparative process. Comments of duTreil at 2-3. The Commission issued a separate Notice seeking comments on possible changes to the comparative hearing process. *Notice of Proposed Rule Making, Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992).

Arguments of the nature raised by duTreil would be more appropriately considered in that proceeding and we have, therefore, incorporated duTreil's comments in that proceeding.

[19] As we said in the *Notice*, should the number of defective applications rise to a point where we are returning more than 15% of the applications received, we would not have the resources to continue a lenient approach and might have to consider reimplementing tougher procedures. *See Notice*, 6 FCC Rcd at 7268.

[20] As we have stated, under the FM "hard look," an application must contain an *original* signature as filed. *See Mary Ann Salvatoriello*, 6 FCC Rcd 4705 (1991). The rules adopted today continue to require original signatures and to reject facsimile signatures on commercial FM applications.

[21] While all other items in our minimum filing requirement are also included in our existing tender criteria, class of station is a new requirement added in this proceeding. It was not an original tender requirement because, at the time of the *Hard Look Order*, facility downgrades could be made only by means of a petition for rule making. Now that facility downgrades can also be accomplished by application, a station's class has become more important. The information is included in the basic data base entry, used to group mutually exclusive applications, and used to determine spacing.

[22] We will not consider critical data to be "omitted" for purposes of this determination if that same data is clearly available elsewhere in the application. We emphasize that missing data will not be excused in this context if the staff would be required to derive that information rather than simply look elsewhere in the application to find it.

more than 3 of the second tier items listed in Appendix C.[23] We will require applications to meet these minimum filing requirements prior to close of the filing window in window proceedings and as initially filed in first come, first served proceedings. *See generally* 47 C.F.R. Section 73.3573(g). Applications not satisfying either tier of our minimum filing requirement within the required time period will be returned to the applicant with no opportunity for corrective amendment. We believe that this minimum filing requirement will provide the staff with the most essential information and limit the potential for abuse, while still giving applicants considerably more leeway than they have under the current "hard look" approach.

16. Our establishment of the above minimum filing requirement does not alter the fact that under our rules and policies certain defects related to the filing of broadcast applications are uncorrectable.[24] For example, an applicant cannot cure through amendment the problems of premature or late filing, inconsistent applications, or failure to pay the required application fee. *See* 47 C.F.R. Sections 1.1107, 73.3564(d), 73.3518. Applications which are patently not in accordance with our substantive rules will be considered defective and will not be accepted for filing unless accompanied by an appropriate waiver request. *See* 47 C.F.R. Section 73.3566.

Deficiency Letters

17. The *Notice* proposed that the staff would notify applicants of defects by deficiency letter and that an applicant's opportunity for corrective amendment would attach upon issuance of that letter. Several commenters suggest that the Commission notify applicants of defects via telephone instead. Comments of Mullaney at 3; Comments of HBP at 6. Another argues that we should replace our current deficiency letter with two letters: one for "deficiencies" and one for "discrepancies." Comments of CDE at 3. We believe that the deficiency letter proposed in the *Notice* is preferable to either of these suggestions because our proposed letter would be simpler to administer, would establish a record of our actions, and would set a more definite deadline for applicant response. Accordingly, we shall use deficiency letters to notify applicants of defects in their commercial FM applications.

18. We also wish to clarify our statement in the *Notice* that an applicant must correct *all* tender and acceptance defects within its limited opportunity for amendment, including any such defects that, for whatever reason, the deficiency letter does not identify. One commenter perceives this as an indication that our staff will stop processing at the first defect with no attempt to identify other defects. Comments of HBP at 4-5. That is not our intention. The staff will make a *reasonable* effort to identify all defects. Recognizing, however, that the staff may not identify every problem present, we wish to make very clear that the ultimate burden of ensuring a complete and acceptable application continues to rest with the applicant and not with the Commission. Failure of our staff to identify a particular defect, for whatever reason, will not be grounds for appeal. Therefore, prudent applicants will conduct their own review of their applications, examining these applications for any errors that may be present and reviewing their corrective amendments to make certain that they have not created any new inconsistencies.

Universe of Applications Affected

19. **Modification Applications.** The *Notice* proposed to apply our modified standards to all applications for commercial FM frequencies. We noted, however, the effect that this change would have on applications proposing to modify existing facilities. Under current policies, when faced with conflicting modification applications, we grant the first non-defective application received. Applying our new approach to modification applications, however, a previously filed defective application could, by corrective amendment, prevail over a later filed non-defective application.

20. The commenters addressing this issue do not view this change as a problem and support the inclusion of modification applications in our new approach. They argue that modification applications are too important to the success of existing stations to justify retention of current "hard look" standards for these applications. Comments of FCBA at 7-8. They also state that if the Commission intends to permit applicants to correct defects, then it is logical to retain the applicant's place in the processing line. Comments of HBP at 7.

21. Upon our review of this matter, we conclude that FM modification applications are not sufficiently different from applications for new facilities to warrant different treatment with respect to defects. Accordingly, we will apply our new rules to all commercial FM applications, including modification applications. This will establish uniform commercial FM rules concerning defects and enable all applicants to benefit from our more lenient procedures.

22. **Waiver Requests**. Our *Notice* proposed that an applicant will not be able to cure defects resulting from the denial of a waiver request. We reasoned that an applicant's decision to file a waiver request is not an error but a conscious choice, unlike tender and acceptance defects which are usually inadvertent.[25] No commenter ad-

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[23] In examining an application for minimum filing criteria our staff will limit its examination to the presence or omission of information. Applications meeting our minimum requirement may well be unprocessable if, for example, they contain inconsistencies in the information supplied. Accordingly, it will be necessary for the staff to examine applications for tender and acceptance defects at a later stage of review and to request corrective amendment of applications containing tender and/or acceptance defects.

[24] For example, an applicant omitting its financial qualifications could meet our minimum filing requirement. However, as we require applicants to be financially qualified *as of the time of application*, an applicant seeking to correct the underlying problem would have to submit an amendment showing that it was financially qualified at the time of application. *See Report and Order*, Gen. Docket No. 88-328, 4 FCC Rcd 3853, 3859 (1989). An amendment based on financial qualifications acquired subsequent to initial filing would not cure the defect.

[25] In response to this language in our *Notice*, one commenter suggests that we require all applicants making corrective amendments to certify that their original errors were inadvertent. Comments of Mullaney at 4. We do not wish to prolong our processes by opening the door to disputes about the applicant's state of mind in submitting a defective application. Furthermore, we do not believe that the proposed certification is necessary because our application procedures include sufficient safeguards to prevent prejudice due to errors that are not inadvertent.

dresses the issue of waiver requests. Based on the reasoning in the *Notice*, we will not permit corrective amendment of defects that result from staff denial of a waiver request. We also have decided not to consider alternatives to waiver requests supplied in the event of denial of the waiver. The *Notice* originally proposed that the staff might consider such alternatives if they contain all information necessary to render the application tenderable and acceptable for filing. Upon further consideration, however, we find that our original proposal would, in effect, require the staff to process denied waiver applications twice -- once to consider the waiver request and once to consider the alternative. Additionally, it is likely that such a policy would encourage a significant number of applicants to request waivers because an applicant would have nothing to lose if the waiver were denied. Because consideration of waiver requests generally requires significantly more effort than the processing of routine applications, an increase in the number of waiver requests would lead to disproportionate delays in the processing of other applications. In the interest of efficient use of our limited staff resources, applicants submitting waiver requests will not be given any opportunity to cure defects resulting from denial of their waiver requests, even if the original application contains the curative information as an alternative.

23. **Effective Date.** The *Notice* proposed that our modified "hard look" approach would apply to applications received after implementation of the new rules. Although we also considered giving applicants with pending applications and appeals an opportunity for corrective amendment, we tentatively decided that this would not be efficient for our staff and might unduly delay initiation of FM service to the public.

24. The commenters addressing this issue are split in their views. Commenters suggesting that we apply our modified rules to pending applications argue that the "hard look" is no longer needed and that allowing an opportunity for amendment would eliminate litigation delays. Comments of Goodale and Leland at 4-5; Comments of Glaser at 7. The remaining commenters addressing this issue agree with the Commission's reasoning in the *Notice*. They maintain that reinstatement of previously dismissed applicants now on appeal would disrupt the orderly processes of the Commission by causing a flood of additional pleadings, disruption of comparative hearings, expense, and delay. Reply Comments of Moran at 4; Comments of Lacy at 4. They also urge the Commission to consider fairness to mutually exclusive applicants who complied with our "hard look" requirements. Comments of Foothills at 4; Comments of Golden Corners at 1-2.

25. We stand by our tentative decision not to apply our modified "hard look" rules to applications already on file. The main advantage presented for applying the rules to applications already on file is that it would end time consuming appeals of staff dismissals. Inclusion of previously dismissed applicants in the Commission's comparative hearing process would, however, be time consuming and disruptive in and of itself, especially for proceedings that would have to be reopened or interrupted at a late date. The Commission's comparative hearing process would be unacceptably disrupted by the volume of additional hearing participants that would result from an across-the-board application of today's modifications to pending applications and appeals. Our decision to process applications under the rules in effect on their date of receipt would avoid undue disruption of our processes and the consequent harm of delayed initiation of service. This decision would also be fair and equitable to all applicants. *See generally Oxnard Broadcasting, Inc.*, 7 FCC Rcd 2178 (1992) (waiver of "hard look" requirements for one applicant unfair to competing applicants who complied with "hard look" requirements). Accordingly, the modifications adopted today will apply only to applications received on or after **August 7, 1992.**

FINAL REGULATORY FLEXIBILITY ANALYSIS

26. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

The purpose of the Commission's action is to give commercial FM applicants an opportunity to correct what would otherwise be fatal errors in their applications without causing a significant increase in the burden on our processing staff. Our action is possible as the result of recent changes in the quality and quantity of commercial FM applications.

II. Public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

We considered and rejected a number of other approaches described in the *Notice*, including adoption of existing processing systems used in the AM and TV services and use of a hybrid option giving FM applicants one opportunity to amend at the tender stage and one opportunity to amend at the acceptance stage. We concluded that the procedures adopted herein are preferable because they are more tailored to the commercial FM service and would be more efficient for our staff.

PAPERWORK REDUCTION ACT STATEMENT

27. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements and will not increase burden hours imposed on the public.

ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, Part 73 of the Commission's rules IS AMENDED as set forth in Appendix B below. These rules are effective **August 7, 1992.** Because the rule changes established herein relieve a restriction, they are exempt from the effective date requirement established in the Administrative Procedure Act. *See* 5 U.S.C. Section 553(d)(1).

29. IT IS FURTHER ORDERED that the Petition for Rule Making filed on April 27, 1989 by the Association of Federal Communications Consulting Engineers IS DISMISSED AS MOOT.

30. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

31. For further information, contact Irene Bleiweiss at (202) 632-6485.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments:

Association of Federal Communications Consulting Engineers ("AFCCE")
Cohen, Dippell & Everist ("CDE")
duTreil, Lundin, & Rackley ("duTreil")
Michael L. Glaser ("Glaser")
Golden Corners Broadcasting, Inc. *et al.* ("Golden Corners")
R. Donnie Goodale ("Goodale")
Haley, Bader & Potts ("HBP")
Caren Lacy ("Lacy")
Leland Broadcasting Group ("Leland")
Mullaney Engineering ("Mullaney")

Late-filed Comments:

Federal Communications Bar Association ("FCBA")

Reply Comments:

Foothills Broadcasting, Inc. ("Foothills")
R. Donnie Goodale ("Goodale")
Hara Broadcasting Group ("Hara")
Leland Broadcasting Group ("Leland")
Sharon M. Moran ("Moran")
National Association of Broadcasters ("NAB")

APPENDIX B

Title 47 of the Code of Federal Regulations, Part 73, is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303.

2. 47 C.F.R. Section 73.3522 is amended by revising paragraph (a)(6) to read as follows:

Section 73.3522 Amendment of Applications

(a) * * *

(6) Subject to the provisions of Sections 73.3525, 73.3573, and 73.3580, applications for non-reserved band FM stations (other than Class D stations) may be amended as a matter of right during the appropriate window filing period pursuant to Section 73.3564(d). For a period of 30 days following the FCC's issuance of a Public Notice announcing the tender of the application, minor amendments may be filed as a matter of right. For applications received on or after **August 7, 1992**, an applicant whose application is found to meet minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the FCC staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff. [For minimum filing requirements see Section 73.3564(a). Examples of tender defects appear at 50 Fed. Reg. 19936 at 19945-46 (May 13, 1985), *reprinted as* Appendix D, *Report and Order*, MM Docket No. 91-347, FCC 92-328, 7 FCC Rcd _____ (adopted July 16, 1992). For examples of acceptance defects, see 49 Fed. Reg. 47331.] Prior to the end of the period specified in the deficiency letter, a submission seeking to correct a tender and/or acceptance defect in an application meeting minimum filing requirements will be treated as an amendment for good cause if it would successfully and directly correct the defect. Other amendments prior to designation for hearing or grant will be considered only upon a showing of good cause for late filing or pursuant to Section 1.65 or Section 73.3514. * * *

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3. 47 C.F.R. Section 73.3564 is amended by revising paragraph (a) to read as follows:

Section 73.3564 Acceptance of Applications

(a) Applications tendered for filing are dated upon receipt and then forwarded to the Mass Media Bureau, where an administrative examination is made to ascertain whether the applications are complete. Except for low power TV, TV translator, TV booster, and non-reserved band FM (except for Class D) applications, those found to be complete or substantially complete are accepted for filing and are given file numbers. In the case of minor defects as to completeness, the applicant will be required to supply the missing or correct information. Applications that are not substantially complete will be returned to the applicant. In the case of non-reserved band FM applications received on or after **August 7, 1992**, applications will be placed on public notice if they meet the following two-tiered minimum filing requirement prior to close of the filing window in window proceedings and as initially filed in first come/first served proceedings: (1) the application must include: (a) applicant's name and address, (b) applicant's original signature, (c) principal community, (d) channel or frequency, (e) class of station, and (f) transmitter site coordinates; and (2) the application must not omit more than 3 of the second tier items specified in Appendix C, *Report and Order*, MM Docket No. 91-347, FCC 92-328, 7 FCC Rcd _____ (adopted July 16, 1992) *Reprinted at* 57 Fed Reg. 34872, 34878-79 (August 7, 1992). Applications found not to meet minimum filing requirements will be returned to the applicant. Applications found to meet minimum filing requirements but that contain deficiencies in tender and/or acceptance information shall be given an opportunity for corrective amendment pursuant to Section

73.3522. Applications found to be substantially complete and in accordance with the Commission's core legal and technical requirements will be accepted for filing. Applications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment. In the case of low power TV, TV translator and TV booster applications, those found to be complete and sufficient will be accepted for filing and given file numbers. Low power TV, TV translator, and TV booster applications that are not complete and sufficient will be returned to the applicant.

NOTE: For non-reserved band FM applications received prior to **August 7, 1992**, applications with deficiencies in tender and/or acceptance information will be returned to the applicant without an opportunity for corrective amendment. *See* 50 Fed. Reg. 19936 (May 13, 1985).

APPENDIX C

MINIMUM FILING REQUIREMENT

This Appendix details the elements of our two-tiered minimum filing requirement, their origin, and the places that these elements appear on the February 1992 edition of our Form 301 Application. In several instances where these elements will be numbered differently on the August 1992 edition of the Form 301, we have so noted. References to "Appendix D" are to Appendix D of the *Hard Look Order*, 50 Fed. Reg. 19936 (May 13, 1985) which, for the convenience of readers, is republished without change as Appendix D in this proceeding.

Applications must meet both tiers of the minimum filing requirement herein prior to close of the filing window in window proceedings and as initially filed in first come, first served proceedings. Applications that do not meet our minimum filing requirement within the relevant time period will be returned to the applicant with no opportunity for corrective amendment.

Tier 1 Requirements: Applications must contain all of the following:

1. **Applicant's name and address**. FCC Form 301, February 1992 edition, Section I, Question 1. *See Hard Look Order*, Appendix D, requirement (1)(a).

2. **Applicant's original signature**. FCC Form 301, February 1992 edition, Section VII. *See Hard Look Order*, Appendix D.

3. **Principal community**. FCC Form 301, February 1992 edition, Section I, Question 3(b) or Section V-B, Question 1. *See Hard Look Order*, Appendix D, requirement (4)(c).

4. **Channel or frequency**. FCC Form 301, February 1992 edition, Section I, Question 3(a) or Section V-B, Question 1. *See Hard Look Order*, Appendix D, requirement (4)(c).

5. **Class of station**. FCC Form 301, February 1992 edition, Section V-B, Question 1. New requirement important for basic data base entry, grouping mutually exclusive applications together, and determining spacing. *See Report and Order*, MM Docket No. 91-347, 7 FCC Rcd _____ (adopted July 16, 1992) *Reprinted at* 57 Fed Reg. 34872. *See also Third Report and Order*, MM Docket No. 86-144, 4 FCC Rcd 3557 (1989).

6. **Transmitter site coordinates**. FCC Form 301, February 1992 edition, Section V-B, Question 2(b).*See Hard Look Order*, Appendix D, requirement (4)(a).

Tier 2 Requirements: Applications meeting Tier 1 above must, in addition, not omit more than three (3) of the following. One or more omissions in any one numbered element listed below will be counted as a single omission.

1. **Applicant's interests in other broadcast stations and applications**. FCC Form 301, February 1992 edition, Section II, Question 8(a) [expected to be renumbered as Section II, Question 11(a) in the August 1992 edition]. *See Hard Look Order*, Appendix D, requirement (3).

2. **Applicant's relatives and their interests in other broadcast stations and applications**. FCC Form 301, February 1992 edition, Section II, Questions 9(a) and 9(b) [expected to be renumbered as Section II, Questions 12(a) and 12(b) in the August 1992 edition]. *See Hard Look Order*, Appendix D, requirement (3).

3. **Certification of compliance with 47 U.S.C. § 310(b) regarding interests of aliens and foreign governments.**FCC Form 301, February 1992 edition, Section II, Question 12(a) [expected to be renumbered as Section II, Question 15(a) in the August 1992 edition]. *See Hard Look Order*, Appendix D, requirement (2)(a).

4. **Certification of financial ability to construct and operate**. FCC Form 301, February 1992 edition, Section III, Question 1. *See Hard Look Order*, Appendix D, requirement (2)(b) *as modified in Report and Order*, GEN Docket No. 88-328, 4 FCC Rcd 3853, 3859 (1989).

5. **Tower and antenna heights**. FCC Form 301, February 1992 edition, Section V-B, Questions 7(a)(1) through 7(a)(3) and Questions 7(b)(1) through 7(b)(3). *See Hard Look Order*, Appendix D, requirement (4)(e).

6. **Effective radiated power**. FCC Form 301, February 1992 edition, Section V-B, Question 9(a). *See Hard Look Order*, Appendix D, requirement (4)(d).

7. **Antenna (directional or non-directional)**. Applicant must respond to the directional antenna question. If directional, an exhibit containing all data required by 47 C.F.R. § 73.316 must be included. FCC Form 301, February 1992 edition, Section V-B, Question 10. *See Hard Look Order*, Appendix D, requirement (4)(f).

8. **Contour Protection for Short-Spaced Assignments**. If filing pursuant to 47 C.F.R. § 73.215, an exhibit demonstrating compliance must be included. FCC Form 301, February 1992 edition, Section V-B, Question 13(e). *See Report and Order*, MM Docket No. 87-121, 4 FCC Rcd 1681, 1686 (1989).

9. **Transmitter site map meeting all requirements**. FCC Form 301, February 1992 edition, Section V-B, Question 15. *See Hard Look Order*, Appendix D, requirement (4)(b); Public Notice of April 5, 1985, 51 Fed. Reg. 45945 (December 23, 1986).

10. **Coverage map meeting all requirements**. FCC Form 301, February 1992 edition, Section V-B, Questions 16(a) through 16(c). *See Hard Look Order*, Appendix D, requirement (4)(g).

11. **Tower sketch**. FCC Form 301, February 1992 edition, Section V-B, Question 8. *See Hard Look Order*, Appendix D, require (4)(h).

12. **Certification of compliance with local public notice requirements of 47 C.F.R. § 73.3580**. FCC Form 301, February 1992 edition, Section VII, Question 1. *See Hard Look Order*, Appendix D, requirement (2)(c).

13. **Certification of site availability**. FCC Form 301, February 1992 edition, Section VII, Question 2. *See Hard Look Order*, Appendix D, requirement (2)(d).

APPENDIX D

For the reader's convenience, we republish below without change the text of Appendix D to the 1985 Hard Look Order. This information was originally published at 50 Fed. Reg. 19936, 19945-46 (May 13, 1985) and issued as a Commission Public Notice as well.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/254-7674. Recorded listing of releases and texts 202/632-0002.

APPENDIX D

STATEMENT OF NEW POLICY REGARDING COMMERCIAL FM APPLICATIONS THAT ARE NOT SUBSTANTIALLY COMPLETE OR ARE OTHERWISE DEFECTIVE

As part of our effort to expedite applications in conjunction with the implementation of the new "window" and "first come, first serve" processing procedures (Report and Order in MM Docket 84-750, Adopted March 14, 1985), we are adopting a new policy with respect to the definition and treatment of applications that are defective or not substantially complete when filed. 1/

Expedition of processing in the face of the possibility of a large increase in commercial FM applications compels us to shift to the beginning of the process some of the application checks previously made later in the process. This shift may well result in a loss of filing status for a returned application that it otherwise would have retained under the previous processing procedures. Such an outcome cannot be avoided if we are to achieve the benefits of the new window and first come, first serve processing procedures.

At the time an application for a commercial FM station or for a modification to an existing commercial FM station is tendered and before an application reference number is assigned, the application will be given a thorough initial review to determine if it is substantially complete. Although all applicable elements of Form 301 are examined by the Commission staff in the course of processing a construction-permit application, certain items are much more critical than others. Without them, processing simply cannot commence. A substantially complete application, one that the Commission deems in condition or sufficient for tender, must meet all of the following requirements.

1. The applicant's name and address must be provided. Failure of an applicant to do so renders it impossible for the processing staff:

   a. to communicate with the applicant concerning the contents of the application; and

   b. to discern and resolve issues relating to the applicant's identity, e.g., multiple-ownership and alien-interest questions.

1/ This policy applies only to commercial FM applicants. AM applicants and non-commercial FM applicants are still subject to the policy set out in our Public Notice of August 2, 1984. TV applicants remain subject to applicable case law.

2. In recent years, the Commission has reduced the amount of information required to be provided in applying for a construction permit and has accordingly simplified Form 301. Applicants are now permitted to make certifications of various types instead of having to provide evidentiary showings. Having relieved applicants of the need to make such showings, the Commission attaches considerable importance to the certifications that take their place. Accordingly, certifications in the following areas are crucial in the absence of full showings.

a. Compliance with 47 U.S.C. §310(b). An application which violates the alien-interest provisions of the Communications Act is statutorily ungrantable. Failure to respond to the question by which certification of compliance is invited renders the application so fundamentally defective that further processing is unwarranted.

b. Financial ability to construct. The Commission authorizes new or changed facilities with the expectation that such will be built quickly and that service will be expeditiously provided via those facilities to the public. It is pointless to grant an authorization of facilities that cannot be built. It is likewise pointless to process an application where a response to certification of financial ability to construct is not provided.

c. Compliance with the local public notice provisions of 47 C.F.R. §73.3580. It is important that local public notice occur. An informed local populace can bring to the Commission's attention information about the applicant or the facility proposal that might otherwise remain undetected. Thus, where local public notice is required, an applicant who fails to respond to the appropriate item of Form 301 will have its application returned as not sufficient for tender.

d. Site availability. The Commission does not require of applicants absolute certainty of site availability, but rather reasonable assurance. An application specifying an unavailable site per se frustrates the Commission's stated goal of expeditious introduction of service. Such a filing requires an amendment specifying a site change before grant or a further application for construction-permit modification after grant. To avoid vacuous and sequential filings, the Commission has imposed a requirement of site-availability certification which includes the name and address of the site owner or his agent. Failure of an applicant to provide the

requisite certification in the form set forth in Appendix B of the Report and Order in Docket 84-750, supra, will result in the application being deemed not substantially complete.

3. Questions 6 and 8 of Section II, Form 301 deal with matters crucial to multiple-ownership determinations. In response to these questions, applicants are to indicate whether or not they or their relatives (immediate family) have any other pending applications or broadcast interests. If the answer to either question is positive, explanatory exhibits must be provided. Leaving these questions unanswered, as a practical matter, makes it impossible for the processing staff to begin a multiple-ownership analysis. In light of our expressed policy dealing with the filing of multiple applications (see Second Report and Order in Docket 84-231, FCC 85-124, Adopted March 14, 1985 and Released April 12, 1985), failure to respond prevents the staff from beginning its ownership analysis and thus renders the applicant's filing not substantially complete.

4. Compliance with the Commission's technical rules is evaluated in the course of an acceptability study. Certain engineering data must be present for such a technical acceptability study to be made. The absence of one or more elements of those data, listed below, prevents a determination of acceptability and thus renders the application not substantially complete.

   a. The geographic coordinates, to the nearest second, of the proposed transmitter site must be provided. Absence of these data makes it impossible to determine the distances from the proposed site to other proposed or existing broadcast facilities and to the community of license. In the commercial FM service, spacing determines acceptability of an application where mutual exclusivity exists with respect to a given allocation, see Trend Broadcasting, Inc., 18 FCC 2d 749 (1969), and determines when mutual exclusivity exists between applicants for or permittees of different allocations. The geographic location also determines whether protection must be afforded to Commission monitoring facilities and to radio quiet zones (see 47 C.F.R. §73.1030), marks the center of the "blanketing" area (see 47 C.F.R. §73.315), and is fundamental to analysis of a proposal's environmental effects and electromagnetic effects on other, nearby communications facilities.

   b. A transmitter site map as described in Form 301, Section V-B, Item 13, and in our Public Notice, Mimeo 3693, released April 5, 1985. Such a map allows the staff to verify the coordinates of the proposed site, the presence of other,

nearby communications facilities and of obstructing terrain features (see 47 C.F.R. §73.315), and the ground elevation of the transmitter site. The last parameter has a key influence on important features of the antenna installation--radiation-center heights above ground and mean sea level, from which, with other data, antenna height above average terrain (HAAT) is derived.

c. The channel number and community of the allocation must be supplied. Since the commercial FM allocation system is organized on the basis of a Table comprising numbered channels and targeted communities, any evaluation of an application must consider these fundamental items.

d. Effective Radiated Power must be specified. Our technical rules prescribe minimum and maximum permissible power levels. Application processing includes a determination that proposed operating power falls within the range defined for the particular class of station occupying or intended to occupy the allocation. Certain allocations have limitations imposed on ERP, as do some stations authorized prior to implementation of the Table Method of Allocations. International agreements also influence permissible ERP levels in border areas. The operating power is so basic a parameter of a broadcast facility that it simply must be specified. Accordingly, its absence will render an application not substantially complete.

e. Also necessary are the antenna heights above average terrain, above ground level, and above mean sea level. These three are interrelated and must be specified consistently, as is the case with all other crucial engineering parameters. Antenna height is as elemental a facility parameter as is ERP. It also is subject to permissible-range values as a function of station class and, with ERP, determines the coverage area of a facility for a given signal strength. Antenna height is also limited in certain cases by international treaty or by allocation constraints. Antenna height and ERP are also used to determine adverse potential to radio quiet zones, adjacent and co-channel "grandfathered" stations, and to FCC monitoring facilities. Antenna height above ground affects the environmental and aerial-navigation aspects of a facility proposal. Clearly, the various antenna heights are employed in a number of processing evaluations by the staff. Their absence, or the absence of any one of them, renders the application not substantially complete.

f. An answer to Item 7, Section V-B must be provided, as whether or not a directional antenna is proposed is a fundamental issue. If a positive response is given, all data specified in 47 C.F.R. §73.316(d) must be included in an accompanying engineering exhibit. Without this information, the processing staff cannot determine the proper location of signal-strength contours, whether city-grade coverage is provided as required, whether adequate protection to short-spaced stations is to be given, and whether or not the proposed directional response complies with our technical rules and appears to be stable.

g. A map or maps satisfying the requirements of Item 10, Section V-B and clearly and legibly showing the proposed 60 and 70 dBu contours and the legal boundaries of the community of license must be provided. Such maps permit ascertainment of compliance with city-grade requirements and permit verification of signal-strength contour predictions. They are also employed in determining comparative levels of proposed service.

h. Section V-G must be provided as part of any Form 301 application proposing construction of a new facility or any change in transmitter site or antenna-structure height to existing facilities. In accord with our existing procedure, for side-mounting proposals involving an existing support structure, Section V-G shall show the application's purpose as, "Alteration of existing antenna structure." The "Facilities Requested" portion shall contain a description of the side-mounting proposal. Section V-G will be accompanied by a tower-sketch exhibit as required by Item 6.

Further, because of the critical importance of the applicant's certification of the correctness of the data contained in the application as of the date of filing, unsigned applications will not be accepted for tender.

If any of the above information is missing, the application will be returned as not sufficient for tender. If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender. If the application is returned

during the initial check as not sufficient for tender, we will not permit the applicant to remedy the defect and have its resubmitted application accepted nunc pro tunc in order to be grouped with other applications filed by a window closing date or in order to be considered first filed when a window does not apply.

Where an application is timely filed within and in response to a filing window, at the initial screening we will consider the application as originally filed, together with any amendments filed within the window period. Where "first come, first serve" processing rules apply, the application only as originally filed will be considered. If an applicant discovers that its "first come" application is not sufficient for tender, it must file a new, corrected application (and request return of its earlier application) to cure the tenderability defect. Nunc pro tunc treatment will not be afforded in such cases.

If any of the defects listed above are overlooked during the initial review and are found later in the process, the application will be returned as inadvertently accepted for tender and, if resubmitted, will not be accepted nunc pro tunc. Return of the application will void the application reference number inadvertently assigned and whatever rights of tender might have been associated with it.

An application found to be sufficient for tender will be studied to determine its acceptability for filing, that is, to determine whether it is in compliance with applicable Commission rules. If it is found acceptable for filing, it will be included in a Public Notice of Acceptance. If found to be unacceptable for filing, it will be returned and will not be accepted later on a nunc pro tunc basis.

If an application is accepted for filing but is subsequently found not to be grantable, the applicant, if not mutually exclusive with other applicants, will be given one opportunity to correct the application. If the acceptable but not grantable application is mutually exclusive, an appropriate issue will be specified in the Hearing Designation Order, or a post-designation amendment, if appropriate, will be required.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HALCOMM, INC. File Nos. BALCT-900430KH
(Assignor) BALCT-900430KI

and

KX ACQUISITION
LIMITED PARTNERSHIP
(Assignee)

For Consent to the Assignment
of Licenses for
Station KXLI(TV), St. Cloud, Minnesota
and
Station KXLT-TV, Rochester, Minnesota

ORDER

Adopted: July 28, 1992; Released: August 10, 1992

By the Commission:

1. The Commission has before it for consideration: (a) the August 7, 1990 action of the Chief, Video Services Division, authorizing the assignment of the licenses of stations KXLI(TV), St. Cloud, Minnesota, and KXLT-TV, Rochester, Minnesota, from Halcomm, Inc. (Halcomm) to KX Acquisition Limited Partnership (KX Acquisition); (b) the October 22, 1991 action of the Chief, Video Services Division, dismissing a petition submitted by N. Walter Goins (Goins), a minority shareholder in Halcomm, for reconsideration of that action; (c) the October 31, 1991 application for review of that action submitted by Goins; (d) and the November 15, 1991 opposition to the application for review submitted by KX Acquisition.

2. In dismissing the petition for reconsideration, the staff noted that Public Notice of the grant of the two licenses was released on August 15, 1990. The staff stated that, pursuant to Section 405 of the Communications Act, Goins had had until September 17, 1990, to request reconsideration, but did not do so until December 7, 1990. Accordingly, the staff stated that the Commission had no authority to entertain the petition, citing *Reuters Limited v. F.C.C.*, 781 F.2d 946 (D.C. Cir. 1986). Further, the staff found no grounds for initiating a revocation or enforcement proceeding.

3. In his application for review, Goins contends that his petition was timely filed, because he had pending a petition for reconsideration of a finding that he was not financially qualified to remain an applicant for a new radio station in Minnesota.[1] We disagree. Goins' pending petition in one proceeding did not absolve him of his responsibility under the Communications Act to respond in a timely manner in a different proceeding. Goins also argues that, because he is a member of a minority group, Congress' prohibition of any change in the Commission's minority ownership policies with respect to comparative licensing, distress sales, and tax certificates[2] mandates that the Commission hold a hearing to determine his interests in Halcomm. Because the matter before us has nothing to do with any of the policies cited by Goins, we reject the applicant's claim.

4. We have reviewed the actions of the Chief, Video Services Division, and we conclude that the matters were fairly considered and properly decided under applicable precedent. Accordingly, IT IS ORDERED that the application for review filed by N. Walter Goins IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy,
Secretary

[1] In that proceeding, the Review Board upheld the financial disqualification of Goins in a hearing for an FM construction permit in Eden Prairie, Minnesota. *Roxanne Givens, et al.*, 5 FCC Rcd 5371 (Rev. Bd. 1990). Goins had argued that his rights under state law as a dissenting shareholder in Halcomm made him financially qualified.

[2] Public Law 101-515, Stat. 2136 (Nov. 5, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-502

In re Applications of

Michelle Elaine Hulse, et al., d/b/a HULSE, HORN, METZGER & WOOKEY, G.P. — File No. BPH-890526MG

BEN L. UMBERGER — File No. BPH-890530MI

For Construction Permit for
New FM Station, Channel 228A,
Chandler, Indiana

Appearances

Russell C. Powell, Esq., on behalf of Hulse, Horn, Metzger & Wookey, G.P.; and *Stephen C. Simpson, Esq.*, on behalf of Ben L. Umberger.

DECISION

Adopted: July 30, 1992; Released: August 11, 1992

By the Review Board: ESBENSEN and GREENE. Board Member BLUMENTHAL issuing Concurring Statement.

Board Member ESBENSEN:

1. Only the two captioned applicants remain in this proceeding. Ben L. Umberger (Umberger) filed exceptions, and Hulse, Horn, Metzger & Wookey, G.P. (HHM&W) filed a reply, to the *Initial Decision*, 7 FCC Rcd 1954 (1992) (I.D.), of Administrative Law Judge Joseph Chachkin (ALJ). Neither party has requested oral argument before the Board.

2. The hearing below was conducted and decided solely on the "standard comparative" issue, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*1965 Policy Statement*), following the favorable resolution of "air hazard" issues specified against both applicants. *See Orders*, FCC 91M-716, released February 22, 1991 (Umberger), and FCC 91M-836, released March 5, 1991 (HHM&W).

HULSE, HORN, METZGER AND WOOKEY

3. The ALJ determined that HHM&W is a general partnership consisting of four partners: Michelle Hulse, 85%; William Horn, 5%; Janet Metzger, 5%; and Brent Wookey, 5%. HHM&W Exh. 1. Hulse has known her other General Partners for more than ten years. Tr. 58-59, 62-63, 152, 171. Hulse will contribute all the funds necessary for construction and operation of the station. Tr. 54, 93. The remaining partners have received partnership shares in return for their promises to work at the station. I.D., para. 5.

4. *Michelle Hulse*: Hulse is a 37-year old resident of Evansville, Indiana. HHM&W Exh. 2, p. 1. She has lived within the service area of the proposed station since 1957, Tr. 29-30, and intends to remain at her current residence if HHM&W's application is granted. I.D., para. 10. Hulse proposes to be integrated part-time (30 hours per week) into the operation and management of HHM&W's proposed station. HHM&W Exh. 2, p. 1; Tr. 84. She will serve as the station's General Manager, and will have ultimate responsibility for all aspects of station operation, including the hiring and firing of employees, the monitoring and supervision of the station's financial affairs, HHM&W Exh. 2, p. 1, and the sales and programming managers will report directly to her. Tr. 85-91. However, in the event of a grant of the construction permit to HHM&W, Hulse intends to continue her 15-year employment as a computer literacy teacher. HHM&W Exh. 2, p. 1; Tr. 38. It is her intention to work at the station on weekdays from 3:15 PM until 8:30 PM, and complete the balance of her commitment on weekends. Tr. 84-85; I.D., paras. 6, 8. The ALJ further determined that Hulse "has engaged in significant civic activities in the station's proposed service area since 1976." I.D., para. 11.

5. *William Horn*: Horn, another General Partner in HHM&W, proposes to work on a full-time basis as Station Manager. HHM&W Exh. 3, at p. 1. In this position, Horn will have responsibility for the sales operation and staff. *Id.* He will create a marketing plan and will hire and supervise staff to help him implement this plan and the ongoing sales effort for the station. *Id.* Horn was born in Evansville, Indiana and is 43 years old. *Id.* He grew up in the city of Evansville (within the 1 m/Vm contour of the proposed Chandler station) and resided there (except for a nine-month college term between 1968 and 1972) until 1974. *Id.* He is currently a bio-medical equipment technician at Duke University Hospital, Durham, North Carolina. Tr. 151. Prior to the commencement of program tests, Horn will resign from, or discontinue, whatever employment or other activities he is engaged in at the time and move to Chandler, Indiana, to assume his duties at the proposed station. Hulse Exh. 3. Horn graduated from Indiana University in 1972 with a B.A. degree in Radio and Television. *Id.* He has worked in broadcasting in the following full-time positions: WIKS-FM, New Bern, North Carolina, Sales Account Executive from March 1987 through August 1988; WISP/WQDW-FM, Kinston, North Carolina, Station Manager (Sales) from August 1983 through March 1987; WWCM, Brazil, Indiana, General Manager from March 1981 through June 1983; and at WSON/WKDQ-FM, Henderson, Kentucky, Operations Manager from June 1972 through July 1974. HHM&W Exh. 3, pp. 1-2; I.D., paras. 12-14.

6. *Brent R. Wookey*: Wookey intends to work on a full-time basis at HHM&W's station as its Operations Manager. In this position, he will have responsibility for the programming operations and staff. He will plan and produce the station's programming and hire and supervise production and announcing staff to assist him. *Id.* If HHM&W's application is granted, and prior to the commencement of program tests, Wookey will resign from, or discontinue, whatever employment or other activities he is engaged in at that time (including his part-time position as an announcer at WFLN and WLXR-FM, LaCrosse, Wis-

consin), and move his residence to Chandler, Indiana, to fulfill his pledge. Wookey completed a one-year course in Radio and Television at the Brown Institute in Minneapolis, Minnesota in 1976. He has worked in broadcasting in the following full-time positions: WSSQ-FM, Sterling, Illinois, Station Manager (Sales) from March 1988 through October 1988; WDAN/WDNL-FM, Danville, Illinois, General Manager from September 1986 through September 1987, as Operations Manager from June 1980 through September 1986, and as an Announcer from August 1978 through June 1980; and, WTIM/WEEE-FM, Taylorville, Illinois, as Program Director from July 1976 through August 1978. Wookey was responsible for filing the original Rule Making petition which resulted in the allocation of this FM channel to Chandler, Indiana. HHM&W Exh. 4, pp. 1-2; I.D., paras. 15-16.

7. The ALJ also found that HHM&W has no attributable media interests, and will install auxiliary power. I.D., paras. 17-18.

BEN L. UMBERGER

8. Umberger, an individual applicant, does not claim any integration credit. Umberger Exh. 1. The ALJ found that Umberger has no ownership interest in any medium of mass communications, nor has any other attributable media interests; however, "he does have pending an FCC Form 301 application seeking authority to construct a new FM station on Channel 230A at Noblesville, Indiana, and is currently Chief Operator for WMTX(FM), Clearwater, Florida (formerly WNLT) and WHBO(AM), Pinellas Park, Florida." I.D., paras. 19-20. It should be noted that Umberger's application for the Noblesville, Indiana, facility was denied in *Bible Broadcasting Network, Inc.*, 7 FCC Rcd 432, 437 (Rev. Bd. 1992), and the Board's *Decision* in that proceeding has been affirmed by the Commission (FCC 92-307, released July 22, 1992).

ALJ'S CONCLUSIONS

9. In considering all of the foregoing, the ALJ ultimately concluded that Hulse would be credited with her part-time proposal, and held (I.D., para. 28):

> In summary, HHM&W deserves quantitative credit of 66.25% for the involvement of its three partners. In view of Umberger's . . . lack of any integration credit whatever, this fact alone mandates the award of the authorization at issue to HHM&W, without regard to the enhancement credit due to it for . . . local residence, civic involvement and broadcast background. *Van Buren Community Service Broadcasters, Inc.*, 50 RR 2d 115, 119 (Rev. Bd. 1981). Even if Hulse's integration is discounted, the unchallenged 10% integration of William Horn and Brent Wookey, as enhanced by past and future local residence and broadcast experience (as well as the partnership's auxiliary power proposal), is more than sufficient to serve as the basis for the award of the permit at issue to HHM&W. *See, e.g., Town & Country Radio, Inc.*, 70 FCC 2d 572 (Rev. Bd. 1978).

EXCEPTIONS

10. Umberger contends that HHM&W is entitled to no integration credit whatsoever because Hulse has not demonstrated how she can effectuate her part-time pledge, and that the "alleged roles the principals . . . shall maintain at the proposed station" mandate no other integration credit. Umberger Exceptions at para. 8. Umberger also claims that the ALJ erred in not adding financial and misrepresentation issues against HHM&W. *Id.*

11. *HHM&W's Integration*: Turning first to the proposed integration pledges of General Partners Horn and Wookey, Umberger appears to argue that the fatal flaws in their respective proposals hinge upon the following: Hulse alone, as the 85% equity owner, will provide all funding for the station, and neither Wookey nor Horn "will be required to contribute any capital." Umberger Exceptions at para. 21. Further, Horn and Wookey "can only receive a salary if Hulse approves . . .," and Hulse may "fire Horn and Wookey." *Id.* Moreover, Umberger claims, HHM&W's proposal is flawed by the apparent lack of negotiation of partnership equity interests; Hulse set the terms, and "there was no back and forth negotiation." *Id.*, at para. 22. Umberger further posits that Hulse, who has "no broadcasting experience," will not "embark on a suicidal business venture of overloaded management and bloated debt simply to honor the applicant's integration pledge. The [HHM&W] integration commitment is inherently suspect...." *Id.*, at para. 28.

12. In reply, HHM&W contends that its proposed integration was based on "business considerations, without regard to the comparative effect on its application," HHM&W Reply at para. 2, and that Hulse "passed up the idea of an applicant consisting of [then-considered] 100% female ownership . . . in favor of a general partnership that was much weaker under the Commission's comparative criteria . . . ." *Id.*, at para. 3. HHM&W also submits that Hulse can and will fulfill her integration pledge, especially because she will solely provide "every dollar of construction and operating capital," *id.*, at paras. 7-9, and because she owns an 85% equity interest. Umberger's perceived flaw that she has "the power to do as she wishes" only strengthens her authority as proposed General Manager "and supports her proposed integration." *Id.*, at para. 14. Thus, HHM&W argues that it has demonstrated that its controlling principal will, in fact, exercise control, and has left no "uncertainty about the true nature of its organizational structure." HHM&W Reply at para. 16. As to Horn and Wookey, HHM&W points out that their broadcast experience "qualifies them for their proposed roles," *id.*, at para. 16, and correctly observes that Umberger provides "no direct challenge" to the proposed integration of these two General Partners, and "no explanation as to why HHM&W's intention to install Horn and Wookey as Sales [Manager] and Program Manager, respectively . . . should not be fully credited." *Id.*, at para. 25.

13. *HHM&W's Financial Qualifications*: Umberger originally requested financial and misrepresentation issues against HHM&W before the ALJ. However, the ALJ refused to add the issues by *Memorandum Opinion and Order*, FCC 91M-3023, released October 4, 1991. Umberger now renews his request for the addition of these issues in his exceptions.

14. In pertinent part, Umberger claims that Hulse "intends to employ financial sleight-of-hand" by borrowing sums from her mother and utilizing various "lines of credit" and "credit cards" to finance construction and

operation of HHM&W's proposed facility. Umberger Exceptions, para. 33. Umberger claims this is merely a "pyramid scheme" akin to "check-kiting," *id.*, and finds fault with the ALJ's failure to add the issues. He argues that "Hulse can meet its obligations [only] due to the fact that [Hulse's mother], if she liquidates *all* her liquid assets (including a home equity line of $15,000) . . . will be able to meet her loan commitment . . . to the partnership (barely). Apparently, there must be a genetic predisposition in the Hulse family to using consumer credit for a multitude of curious uses." *Id.*, at para. 35.

15. In reply, HHM&W observes that "Hulse indeed has several lines of revolving bank credit . . .," HHM&W Reply at para. 28, but that she does not need these lines of credit to meet her commitment, *id.*, at para. 30, and intends to rely on a loan from her mother. *Id.*, at para. 32. With respect to this loan, Hulse submitted a listing of "more than enough" liquid assets to meet this loan commitment and a declaration of Mrs. Hulse's Certified Public Accountant verifying these liquid assets and the payment of current liabilities from current income. *Id.*, at para. 32, n.10. As a result, HHM&W recounts that the ALJ specifically declared (*id.*, at para. 28):

> Since Hulse had available at the time of certification and currently has available liquid assets in excess of her cost estimate without reliance on personal credit cards, a financial certification and/or financial qualifications issue is not warranted. FCC 92M-3023 ¶ 4.

Finally, HHM&W claims that Umberger "has flagrantly misrepresented the detailed [financial] information" it presented to the ALJ, noting, *inter alia*, that the $15,000 home equity credit line attacked by Umberger "was that of *Michelle* Hulse, not her mother." *Id.*, at paras. 28, 32; emphasis in original.

DISCUSSION

16. *Financial Issues*: The Board will affirm the ALJ's disposition of this matter. Umberger has not presented substantial and material questions of fact sufficient to give rise to the requested issues. *Citizens for Jazz on WRVR v. FCC*, 249 U.S. App. D.C. 342, 775 F.2d 392 (1985). Indeed, the individual proposed lender (Hulse's mother) presented financial information to the ALJ, attested to by her C.P.A., that Hulse relied upon to demonstrate that she possesses sufficient net liquid assets to fund the proposed loan. *Compare Texas Communications Limited Partnership*, 6 FCC Rcd 5191 (1991), *recon. denied*, 7 FCC Rcd 3186 (1992). As a result, Umberger has failed to raise substantial and material questions that HHM&W does not possess the requisite financial qualifications to construct and operate as proposed. *See Scioto Broadcasters*, 5 FCC Rcd 5158 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1893 (1991), *recon. dismissed*, 6 FCC Rcd 4626 (1991). Thus, Umberger's Exceptions in this regard are denied.

17. *HHM&W Integration*: The Board finds absolutely nothing in the record before us to discredit the proposed integration of General Partners Horn and Wookey. Where there is "a good faith division of ownership and . . . it appears from the record that [the principals in question] will have a legitimate interest . . . ." integration credit will be awarded. *KIST Corp.*, 102 FCC 2d 288, 291 (1985), *aff'd by judgment sub nom. United American Telecasters, Inc., v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986); *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7272 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2347 (1991), *recon. dismissed*, 6 FCC Rcd 5183 (1991). And, there is no prohibition against a majority principal, such as Hulse here, in taking the lead in prosecuting an application, providing the other active principals play true and actual roles in management. *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3667 (Rev. Bd. 1987). We noted in *Vela* that one individual owned voting control of the applicant corporation (51%), and the other three voting shareholders owned only 19%, 15%, and 15% respectively.[1] In awarding 100% integration credit to that applicant, the Board stated (*id.*):

> . . . [W]here "an applicant sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out, we will credit that proposal." *Bradley, Hand and Triplett*, [89 FCC 2d 657, 662-663 (Rev. Bd. 1982)]. Here, the intentions of [the applicant] were clear. The partnership agreement set forth the ownership interests and various provisions based on those interests, and the ALJ found that [the majority shareholder] had, in fact, exercised control in conformance with that agreement.
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> * * *
>
> With respect to [the] argument that the partnership agreement was fatally deficient because it did not explicitly provide that the general partners would be permanent, we simply emphasize that there was nothing in the agreement that would support an inference that the partnership was ephemeral. Similarly, the contention that [the majority shareholder's] dominance precludes credit to the other shareholders is without merit. A majority of stock ownership, by its nature, vests ultimate control in the principal holding that stock. Our inquiry relates solely to whether the other owners play true and actual roles in management; we find their proposals [to be sufficient].

Here, General Partners Horn and Wookey have adequately demonstrated that they can and will be integrated into the day-to-day operation of the facility.[2] They are both highly experienced broadcasters with backgrounds in management level broadcast positions; Hulse has known these General Partners for over ten years; and Wookey took the lead in having the channel here allocated (via Rule Making) to Chandler, Indiana. There is simply nothing in the record before us to demonstrate a lack of "reasonable assurance" that Horn and Wookey will not perform as proposed.[3] Further, the HHM&W Partnership Agreement (Umberger Exh. 4) clearly provides that partnership profits will be shared proportionately by each General Partner, and only upon the "retirement, death, or insanity" of a partner may the partnership be dissolved (subsequent to the payment to the departing partner the proportionate value of the partnership at the time).

18. As the ALJ correctly noted (*see* para. 9, *supra*) the integration of Horn and Wookey "as enhanced by past and future local residence and broadcast experience . . . is more than sufficient to serve as the basis for the award . . . to HHM&W," because Umberger, conversely, proposes no integration of ownership into management whatsoever. *See Poughkeepsie Broadcasting Limited*, 5 FCC Rcd 3374, 3380

(Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2497 (1991), *recon. dismissed*, 7 FCC Rcd 658 (1992); *see also Nuance Corporation*, 85 FCC 2d 412, 419 (Rev. Bd. 1981). Thus, we need not reach the question whether Hulse can effectuate her proposed part-time integration commitment because "[a]n agency, like a court, need not decide questions which are not relevant to its decision." *Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992); *Deep South Broadcasting Co., Inc.*, 278 F.2d 264, 266 (D.C. Cir. 1960); *Barry Skidelsky*, 7 FCC Rcd 1382 (Rev. Bd. 1992); *William L. Carroll*, FCC 92R-57, adopted July 8, 1992.

19. ACCORDINGLY, IT IS ORDERED, That the application of Ben L. Umberger (File No. BPH-890530MI) IS DENIED; and the application of Michelle Elaine Hulse, et al., d/b/a Hulse, Horn, Metzger & Wookey, G.P. (File No. BPH-890526MG) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] On the "B cut-off" date, the applicant in *Vela* was a General Partnership with the identical respective ownership interests.

[2] *Compare Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 932-933 (Rev. Bd. 1991) (integration credit denied 49% general partner where majority partner could fire minority partner; could set her compensation; could change format without her consent; and establish "every facet" of station policy). However, in *Atlantic City*, the record evidence further demonstrated that the minority partner was a mere figurehead, specifically sought out only to improve the applicant's comparative posture on the criteria of local residence, civic participation, and female enhancement, "all qualities that [the majority partner] lacks." Further, the minority partner, in her role as "community relations director" of the facility, conceded that she would only merely act as "liaison" between the station and the community, and that she had not been assigned any "specific policy" or "programming responsibility" in the day-to-day operation of the station.

[3] Pursuant to the recently-adopted provisions of 47 CFR § 73.1620(g)(1), HHM&W will be required to disclose the following in the future:

> (g) *Reports required.* In their application for a license to cover a construction permit (FCC Form 302) and on the first anniversary of the commencement of program tests, applicants for new broadcast facilities that were granted after designation for a comparative hearing as a result of a post-designation settlement or a decision favoring them after comparative consideration must report:
>
> (1) Any deviations from comparative proposals relating to integration of ownership and management and diversification of the media of mass communication contained in their application for a construction permit at the time such application was granted . . . .

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

Because I must agree with the panel majority that the 1965 *Policy Statement* [1] and case precedent[2] rationally recognize both disparate ownership shares and a management hierarchy at broadcast stations, and concur that "some" additional factors can here distinguish the discredited ownership/management integration proposal in *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 932, 933 (Rev. Bd. 1991), I do not go so far as to dissent to the singularly dispositive award of management integration credit to the two (5%) minority partners of the prevailing applicant.[3] However, in the spirit of the Commission's *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992), I write to highlight yet another facet of the question of what is sufficient to satisfy the "permanence" requirement for an integration proposal, the standard expressly specified in the 1965 *Policy Statement*[4] under which we necessarily continue to operate. The question of just what constitutes a "permanent" integration proposal is very much at play in the current deliberations over integration.[5]

It is axiomatic, beyond the need of expanded discussion, that in order to receive integration credit two factors must be simultaneously present: (1) an active and cognizable ownership interest: *and* (2) a meaningful role in the day-to-day management of the station. One without the other will not entitle an individual to the vital credit.[6] In various ways, the Commission has striven to protect the "permanence" requirement of its 1965 *Policy Statement*. For example, and by analogy, if the applicant is a two-tiered, active/passive construct, the organizing agreement must protect any *general* partner from precipitate dismissal. *Ownership Attribution*, 58 RR 2d 604, 619-20 (1985)(*on reconsideration*). Another example of the same prophylactic is that, in comparative licensing cases, integration credit is denied (or, *pro tanto*, reduced) where an option or warrant holder might soon displace an original owner. *See, e.g., WWOR-TV, Inc.*, 6 FCC Rcd 6569, 6571-72 n.13. Furthermore, to thwart the gamesmanship of evanescent integration proposals spawned by its so-called " *Ruarch* policy",[7] which allowed settling applicants to summarily abandon an avowed integration pledge, the Commission's *Comparative Hearing Reform*, 6 FCC Rcd 157, 160 (1991), modified that policy to provide that, once an applicant enters the hearing stage, "the successful applicant will be expected to fulfill its . . . integration proposal[ ]." Finally, and in that very same vein, the Commission's recent opinion in *Anchor Broadcasting*, *supra* note 5, while defending its one-year retention rule as sufficient generally to deter abuse, footnoted -- with at least apparent condonation -- the Board's decision in *Martin Intermart, Inc.*, 3 FCC Rcd 1650, 1652 (Rev. Bd. 1988), where integration credit had been denied since it did not appear that an applicant's integration proposal would exceed one year. *See Anchor*, FCC 92-300 n.10.[8] *See also WCVQ, Inc.*, 5 FCC Rcd 3824 (1990)(extraordinary interlocutory intervention to test truthfulness about fulfillment of prior integration pledge). Hence, by a number of disparate mechanisms, both policy and precedent have sought (however imperfectly) to fortify the 1965 *Policy Statement*'s edict that integration credit will not be granted without some clear assurances of "permanence"; or, at minimum, that no *prima facie* evidence beclouds the likelihood thereof.

In the instant case, the winner's ultra-slim margin of victory rests -- as written -- completely on the integration of but two 5% principals.[9] However, not only will neither principal contribute capital to the venture, its relevant principals testified that the 85% principal could unilaterally set their salaries or even fire them at will as *management* employees. *See, e.g.*, Tr. 54-55, 184-188. Yet, just as in *Atlantic City, supra*, the fact that the two might retain their *equity* interests, if fired, is simply irrelevant: it is their (unprotected) *management* positions that would entitle them (if so entitled) to any integration credit. *Compare Atlantic City*, 6 FCC Rcd at 933 (integration credit denied, in part, because majority partner could (1) fire minority partner, at will, from *management* status and (2) set compensation at *any* level unilaterally). *Cf. also Ownership Attribution, supra* (requirements for protection of permanence of status of any *general* partner).

Naturally, even the most sincere intentions of applicants may be frustrated by circumstances, either *before* or *after* the grant of a permit, based on *any* particular criterion specified in the 1965 *Policy Statement*[10]: partnerships or corporations can dissolve or reform; transmitter sites can be lost, thus changing signal coverage calculations; new stations might suffer financial reverses or be sold for any number of reasons (even excluding profiteering). Without question, then, the 1965 *Policy Statement*'s requirement that all aspects of an application proposal must be adhered to on a "permanent" basis must be read not literally, but reasonably. Still, to the degree that we must continue to attempt to apply the "permanence" requirement to integration proposals, and to the same degree reject those proposals where management *and/or* ownership status might very readily and swiftly evaporate, it is troublesome that this instant *Decision* turns directly on the integration of only two "five percenters," whose arrangements appear in many respects to render them no more, really, than quasi-employees,[11] each with a very minor (and utterly speculative) profit-sharing "kicker" in this Chandler proposal.[12]

FOOTNOTES TO CONCURRING STATEMENT

[1] *Ante*, para. 2.

[2] *E.g., Vela Broadcasting Co., ante* para. 17.

[3] For reasons more fully set out in my separate statement in *Kevin Potter*, 6 FCC Rcd 7278, 7281-83 (Rev. Bd. 1991), *nihil dictum quod non dictum prius*, and although this *Decision* does not address the question, *see ante* paras. 10, 17-18, I would grant Umberger's exception to the integration credit of Ms. Hulse, the 85% principal. She had here pledged to integrate as the General Manager of the facility with "ultimate responsibility for *all* aspects of station operation," *ante* at para. 4 (emphasis added), while at the same time she "intends to continue her 15-year employment as a computer literacy teacher." *Id. See generally also Woods Communications Group, Inc.*, 7 FCC Rcd 78, 80 (1992), *recon. denied*, FCC 92-306, released July 22, 1992.

(It is noted and entirely respected that the Commission affirmed the integration credit in *Kevin Potter*, about which I had expressed several rather larger reservations. *Memorandum Opinion and Order*, FCC 92-283, released July 9, 1992. It is also noted that by *Order*, FCC 921-065, released July 20, 1992, that both *Potter* applicants -- who had stoutly avowed their competing integration pledges before the ALJ and this Board -- requested (and were granted) permission to be relieved of those perfervid integration pledges.)

[4] *See* 1 FCC 2d at 395 n. 6 (" . . . it is important that integration proposals be adhered to on a *permanent* basis.")(emphasis added).

[5] *See Anchor Broadcasting Limited Partnership*, FCC 92-300, released July 21, 1992 at paras. 5-7, 16-17 & nn.9, 10.

[6] *See* 1 FCC 2d at 395-396.

[7] *See Ruarch Associates*, 103 FCC 2d 1178 (1986).

[8] Ironically, merely two months after the successful applicant in *Martin Intermart* beat out Martin, in part, on the strength of a "substantial" integration preference, *see* 3 FCC Rcd at 1652, the successful applicant abandoned his pledge upon settlement; Martin would receive the Construction Permit, after all, under the agreement. *See Joint Request For Approval of Agreement* (MM Dkt. 86-363), filed June 1, 1988. The Commission's 1991 *Comparative Hearing Reform, supra*, was intended to thwart such integration gamesmanship by requiring the fulfillment of an integration pledge once the hearing phase has commenced in earnest.

[9] I pass over, without much more comment than I did peripherally in *Kevin Potter, supra* note 3, the question of whether a 10% integration differential is decisionally significant, assuming *arguendo* that the 10% integration credit granted here is warranted. *See* 6 FCC Rcd at 7282 n.2. Suffice it that in the recently issued *Bible Broadcasting Network, Inc.*, FCC 92-307, released July 22, 1992, the Commission stated:

> We agree with the Board that, although the 9.05 percent disparity is not by itself decisive, it is relevant and affords [the applicant] a very slight quantitative advantage . . . .

Id., at para. 4. *See also id.*, at n.4, where the Commission noted:

> Compare *New Continental Broadcasting Company*, 88 FCC 2d 830, 850 (Rev. Bd. 1981), which held that a 12.5 percent quantitative integration differential is sufficient to warrant a slight preference regardless of qualitative enhancements, with *Vacationland Broadcasting Company, Inc., 97 FCC 2d 484, 495 (Rev. Bd. 1984), review denied*, FCC 85-275 (May 21, 1985)(subsequent history omitted), where applicants with a 3.6 percent quantitative differential were "considered equal on quantitative grounds" and *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1475 para. 9 (1987), where the Commission found there was no significant quantitative difference between a 90 percent full time integration proposal and a 79.2 percent full time proposal augmented by 19.8 percent part time integration.

[10] *E.g.*, whereas even a very slight "diversification" demerit can be fatal under the 1965 *Policy Statement, see Bible Broadcasting, supra* note 9, at para. 7; *Kevin Potter (MO&O), supra* note 3, FCC 92-283 at para. 7, nothing of which I am aware would estop a party who had won (with legal finality) a comparative case on even a very "slight" diversification advantage from, shortly thereafter, acquiring up to 35 *more* broadcast stations.

[11] For instance, William Horn, one of the 5% principals slated for integration, is a bio-medical technician at Duke University Hospital. Not only will he contribute no capital, he also testified (1) that, before the application was filed, he did not discuss this proposal very deeply with the majority principal; (2) that he did not truly negotiate his very minor ownership share or even discuss his (potential) salary; (3) that he had no discussions with the other two 5% principals (Brent Wookey and Janet Metzger) prior to the application filing; and (4) that he had absolutely "no" role whatever in the preparation of the application. *See* Tr.

151-157. (At the same time, it is fair to note that Horn is the "station manager of an AM/FM combination in Kingston [sic], North Carolina." Tr. 158.)

[12] With all due respect to my colleagues, the new reporting requirement codified in 47 CFR § 73.1620(g)(1), and referenced in footnote 3 *ante* of our instant *Decision*, does not, as I read it, provide any further assurance of "permanence" here, because all of the winning applicant's principals have been *perfectly* candid from the outset that the two subject 5% owners could be dismissed at will. *Compare WCVQ, Inc.* (issue added to test *truthfulness* of fulfillment of integration pledge); *Anchor Broadcasting, supra*, FCC 92-300 at n.9 (Commission, *had it known*, could have taken "appropriate action" against 100% integration-credited applicant, who sold off 49% only four months after station activation, along with option for remaining 51%).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-90-28

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: July 30, 1992; Released: August 11, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. MCI Telecommunications Corporation ("MCI") has filed a formal complaint against the American Telephone and Telegraph Company ("AT&T") alleging violations of Sections 201(b), 202(a) and 203 of the Communications Act ("Act") in connection with AT&T's Revenue Volume Pricing Plan ("RVPP") and Customer Specific Term Plan ("CSTP"), both offered under AT&T's Tariff FCC No. 2.[1] AT&T has denied the allegations and moved to dismiss the complaint. For the reasons stated below, we grant the complaint in part and deny it in part.

II. BACKGROUND

2. In March 1988 and February 1989, AT&T introduced discount pricing plans for its 800 Services under AT&T Tariff FCC No. 2.[2] The plans were effective July 1, 1989. Under both plans, a small-volume end user could qualify for discounts by aggregating its usage with that of other small-volume end users.[3] Basically, the RVPP or CSTP customer/aggregator would subscribe to AT&T's 800 Service under the RVPP or CSTP plan and would then solicit small-volume end users for inclusion under the aggregator's subscription to the 800 service. In all cases, the end users would receive individual bills although the RVPP or CSTP customer assumed ultimate financial responsibility for payment of all charges for all end user locations designated by the RVPP or CSTP customer. In addition, the aggregator charged these end users a fixed percentage of the amount they saved by participating in the volume discount plans. Thus, the costs to end users were slightly higher than the discount rates but lower than the regular, non-discounted rates. Further, AT&T entered into marketing agreements with some of the aggregators to attract small-volume end users to the plans.

3. MCI filed its complaint shortly after the tariffs became effective, alleging, *inter alia*, that AT&T's traffic aggregation practices and its relationship with traffic aggregators, were anti-competitive in intent and effect. The focus of MCI's complaint is not the practice of aggregation *per se* but the manner by which it claims AT&T manipulated the traffic aggregators to retain customers as well as reacquire customers that had migrated to AT&T's competitors.

III. DISCUSSION

A. Traffic Aggregators as Resellers

Statement of the Issue

4. The parties' pleadings contain a basic dispute over whether the traffic aggregators doing business with AT&T under the RVPP and CSTP plans are resellers within the meaning of the Commission's *Resale and Shared Use* decisions.[4] An underlying allegation in MCI's complaint is that AT&T's policies and practices toward traffic aggregators negated their status as resellers. Thus, as an initial matter, we will resolve the issue whether the subject aggregators are resellers.

Positions of the Parties

5. MCI argues that under AT&T's RVPP and CSTP plans, the aggregators are not resellers in the ordinary sense of that term because in true resale situations, a carrier-customer relationship exists between the entity acquiring the services or facilities from the underlying carrier and the end user. MCI states that no such relationship exists between the underlying carrier and end user in a resale situation. MCI maintains that, under AT&T's RVPP and CSTP plans, traffic aggregators do not assume a carrier-customer relationship with end users nor do they affect the carrier-customer relationship between AT&T and

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[1] MCI also filed identical complaints against fourteen aggregators of AT&T's 800 Service traffic, including: Mid-Com Associates, Inc.; The 800 Association, Inc.; Telepool Network, Inc.; Telecom Analysis, Inc.; International Telecom Group, Inc.; Consolidated Communications Group, Inc.; Advance Network Design; D'Martine Financial Services, Inc.; Elite 800, Inc.; 800 Aggregator LTD.; Cyncom and Associates; Associated Networks, Inc.; COMAC, Inc; and Garden State Long Distance Telephone. On July 25, 1991, MCI filed requests for withdrawal of the complaints against the aggregators. We granted the request and issued an order dismissing those proceedings. *See MCI Telecommunications Corporation v. Mid-Com Associates, et al.*, 6 FCC Rcd 4817 (Com.Car.Bur. 1991). By stipulation of the parties, the records in those proceedings have been incorporated by reference into the instant proceeding.

[2] *See* AT&T Transmittal No. 1167, filed March 21, 1988 (RVPP); AT&T Transmittal No. 1519, filed February 15, 1989 (CSTP).

[3] RVPP and CSTP also attract large-volume end users with multi-location offices, but the complaint focuses on aggregation of unrelated businesses by the traffic aggregators.

[4] *Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) (*Resale and Shared Use Order*).

its end user customers.[5] In addition, MCI claims that resale carriers usually compete with the underlying carrier for customers and do not work in concert with the underlying carrier in the manner that traffic aggregators do under the RVPP and CSTP plans. MCI also alleges that traffic aggregators themselves have strongly denied that they are resellers under AT&T's tariffs.

6. In response, AT&T, relying principally on the *Resale and Shared Use Order*, argues that its relationship with traffic aggregators under the discount and term plans is precisely the type of resale activity that the Commission anticipated would exist in the resale market among underlying carriers, resellers and end users.[6] AT&T argues that MCI's claim that aggregators under the plans do not provide their own transmission services to end users and do not view themselves as resellers is not dispositive for purposes of determining whether there is resale activity. AT&T contends that the nature of the entire transaction and relationship must be examined. AT&T states that in the instant case the traffic aggregators perform resale functions that the Commission foresaw in the *Resale and Shared Use Order* by aggregating the demands of end users with small traffic needs to qualify for volume discount rates.[7] Finally, AT&T argues that MCI's reliance on the aggregators' promotional material only confirms AT&T's claim that the aggregator is an AT&T customer and not agent, partner, joint venturer or subsidiary of AT&T.[8]

Discussion

7. We are not persuaded by MCI's claim that the traffic aggregators under AT&T's RVPP and CSTP plans are not resellers within the meaning of the Commission's *Resale and Shared Use* decisions. The Commission has defined resale activity as the subscription to communications services and facilities by one entity and the reoffering of communications services and facilities to the public for profit.[9] Particularly relevant to the instant case is the Commission's discussion of "broker" resale activity. Generally, a broker functions exclusively as an intermediary, or middleman, uniting an underlying carrier and end users under terms of price and delivery. The Commission in the *Resale and Shared Use Order* acknowledged brokerage resale as a legitimate resale activity and found it to be most prevalent in situations where underlying carriers offer bulk, discounted services.[10] Based on the record before us, it appears that the aggregators are engaged in (brokerage) resale activity within the meaning of the *Resale and Shared Use Order*. The aggregators first subscribe to AT&T's services and reoffer those services to end users by designating the various user locations for inclusion under the aggregator's subscription with AT&T. While AT&T bills the end user directly for the services, it is undisputed that the aggregators retain ultimate responsibility for payment of all charges associated with the tariffed services.

B. Section 201(b) Analysis

Statement of the Issue

8. The gravamen of MCI's complaint case is its contention that AT&T violated the just and reasonable standard of Section 201(b) of the Act by creating a rate structure designed to encourage intermediaries to aggregate the traffic of unrelated 800 Service customers who would not otherwise qualify for the discounts. The objective of this anticompetitive structure, according to MCI, was to retain AT&T's 800 Service customers as well as to reacquire former customers that had migrated to other carriers or services.

Positions of the Parties

9. MCI contends that AT&T's discount plans are specifically designed to encourage third parties to aggregate usage of unrelated 800 Service customers in order to obtain discounts for which they would not individually qualify. According to MCI, AT&T used tariff provisions and anticompetitive marketing agreements to control and direct the aggregators' sales efforts to reacquire or retain business that was or could be lost to AT&T's competitors.[11] MCI argues that AT&T's control over the traffic aggregators in this manner constituted an abuse of its market power and an unjust and unreasonable practice under Section 201(b) of the Act. MCI further alleges that AT&T provided the aggregators with "winback customer leads", which listed users of 800 Services provided by MCI and other interexchange competitors, but did not include current users of AT&T's 800 Service.[12] MCI argues that Sections 201(b) and 202(a) of the Act govern all of AT&T's practices in connection with its regulated services, including marketing practices of dominant carriers, such as tying agreements involving "1+" and "0+" service,[13] the manner in which regulated telecommunications services are offered in connection with unregulated equipment and enhanced services,[14] and the allocation of unpresubscribed traffic to interexchange carriers.[15] MCI posits that even if the Commission lacks authority to regulate marketing practices under Title II of the Act, the Commission does have expansive authority under Title I to prohibit unlawful AT&T marketing practices.

10. AT&T argues that offering discount plans that are attractive to resellers, along with marketing support to promote the plans, is a just and reasonable practice under Section 201(b). AT&T contends that its discount pricing plans are generally available to all customers who satisfy

[5] Opposition at 4, note 6, referring to aggregator promotional materials stating that the end users' relationship with AT&T would not be changed in any way.

[6] AT&T Motion to Dismiss at 5.

[7] AT&T also argues that the Commission has specifically ruled that resellers need not own or control the facilities through which service is offered.

[8] Reply at 3, noting that in MCI's opposition, even MCI conceded that the aggregators described themselves as customers of AT&T who aggregate traffic.

[9] *Resale and Shared Use Order*, 60 FCC 2d at 272.

[10] *Id.*

[11] Complaint at para. 19.

[12] Complaint at para. 12.

[13] Reply at 6, *citing AT&T's Private Payphone Commission Plan*, 3 FCC Rcd 5834 (1988), *application for review pending*.

[14] Reply at 6, *citing Computer II*, 77 FCC 2d 384 (1980), *recon.* 84 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[15] Reply at 7, *citing Access and Divestiture Related Tariffs (Default Carrier)*, 101 FCC 2d 911 (1985).

the requirements contained in the tariff regulations. Further, AT&T argues that its provision of tariffed discounts to resellers is consistent with the Commission's resale policy. According to AT&T, the Commission recognized that one function of "brokers", or resellers, is delivery of volume-discounted service offerings to end users whose traffic demands are insufficient to qualify them individually for a volume discount plan.[16] Thus, AT&T maintains, by subscribing to these discount plans, aggregators or resellers offer end users an opportunity to aggregate their usage with other small end users at discount rates, rates which are lower than the non-discounted rates, as contemplated by the Commission. Finally, AT&T asserts that its marketing activities do not constitute provision of tariffed communications services but rather are business activities aimed at promoting interest in AT&T's tariffed services. According to AT&T, it is free to target its marketing activities for generally available tariffed services to best suit its business needs.

Discussion

11. MCI has not demonstrated that AT&T provides its volume and term discounts in a manner inconsistent with Section 201(b) of the Act or in conflict with the Commission's policies concerning volume discount and resale activity. It is not *per se* a violation of the Act or any Commission order to offer rate structures which promote the practice of aggregation of unrelated end users, or volume discounts. The Commission has specifically held that a carrier cannot lawfully restrict the customers or uses for a volume-discounted offering.[17] In its *Resale and Shared Use Order*, the Commission fully supported the practice of unlimited resale of volume discounts by entities engaged in brokerage resale. The Commission specifically anticipated that unrelated end users would be combined, or aggregated, by resellers. Indeed, the Commission has stated that resellers must be allowed to take a volume-discounted offering on the same terms as a single, high-volume customer because resale helps many small users benefit from volume discounts.[18] In short, the Commission has encouraged resale of communications services because that activity offers substantial public interest benefits. We find no merit in MCI's claim that AT&T's provision of its tariffed volume and term discount plans conflicts with the Commission's resale policy.

12. Nor do we find merit in MCI's claim that AT&T's aggregator marketing practices violate Section 201(b) of the Act. MCI's contention that AT&T targets its marketing efforts towards retaining current customers and reacquiring former customers who migrated to AT&T's competitors is not persuasive. There is simply no support for MCI's contention that AT&T effectively controlled the aggregators by extending marketing support only if the aggregator agreed to target "winbacks" for AT&T.[19] The record reflects that the aggregator companies at issue were not created by AT&T but were pre-existing, independent entities primarily doing business with common carriers.[20] As a subscriber to AT&T's tariffed service, an aggregator has incentive to promote AT&T's 800 Service with or without a marketing agreement. Although AT&T provided billing service to the locations designated under the discount and term plans, it is clear that the aggregators assumed ultimate financial responsibility for any discrepancies or shortfalls as would other customers.[21] In addition, MCI's reliance on aggregator promotional materials to support its claims is unavailing. The promotional materials used by the aggregators advertised AT&T's tariffed discount plans, but they also provided verification information regarding the particular aggregator's subscription. Moreover, as MCI acknowledges, in true resale situations, the reseller also competes with the underlying carrier. Although AT&T provided marketing support to the aggregators in furtherance of its goals to win back former customers, the aggregators also competed with AT&T's Direct Sales Account Teams for the same group of potential end users.[22] Based on the record before us, we find that MCI has not demonstrated that AT&T engaged in unjust and unreasonable practices within the contemplation of Section 201(b) of the Act.

C. Section 202(a) Analysis

Statement of the Issue

13. Under AT&T's RVPP and CSTP plans, the aggregator, after subscribing to the tariffed services, would re-offer those services at different, slightly higher rates, which included the aggregator's fee.[23] The issue raised by

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[16] AT&T Motion to Dismiss at 2 and 7, *citing Resale and Shared Use Order*, 60 FCC 2d at 272, and *Private Line Rate Structure and Volume Discount Practices*, 97 FCC2d 923 (1984) (*"Volume Discount Practices Order"*).

[17] *Volume Discount Practices Order*, 97 FCC 2d at 947.

[18] *Id.*

[19] The aggregators responded that they were not restricted in their marketing efforts to any particular group of customers. Most of the aggregators stated that they mainly pursued AT&T's existing customers.

[20] For example, The 800 Association states that it is in the business of "bringing the lowest available price to the marketplace so the end user has a choice". Answer at para. 18. Telepool Network, Inc. states that it is a "communications management company that assists end users, for a fee, in obtaining services from common carriers..." Answer at para. 2. Garden State Long Distance Telephone states that its company functions as a telecommunications consultant, actively engaged in selling tariffed offerings, reselling network services and marketing price programs. Answer at para. 3.

[21] For example, Mid-Com Associates states that if the minimum monthly billing is not achieved, Mid-Com Associates is liable to AT&T for the shortfall. Answer at para. 25, n.3. The 800 Association, Inc. states that liability for any shortfalls in usage is more of a deterrent for aggregation than an incentive. Answer at para. 10. The Elite 800, Inc. states that it contemplated aggregation under the AT&T tariff, but decided against it in light of the tariff provisions concerning aggregator liability. Answer at para. 1.

[22] For example, The 800 Association, Inc. states that it competed with Direct AT&T Sales Account Teams for customers. The 800 Association also alleges that, in some instances, the AT&T sales teams would make disparaging comments about the aggregator industry. Mid-Com Associates, Inc. states that it was in competition with AT&T in recruiting existing 800 Service customers, explaining that its relationship with AT&T was adverserial from the beginning.

[23] *See, e.g.*, D'Martine Financial Services, Inc. Answer at para. 8; Telepool Network, Inc. Answer at para. 2.

MCI is whether AT&T unlawfully discriminates between end users who subscribed through the aggregators and those who subscribed directly from AT&T.

Positions of the Parties

14. MCI contends that AT&T's provision of 800 Service at different rates to users who subscribed directly with AT&T and to those who subscribed indirectly through traffic aggregators under the volume discount plans constitutes unlawful discrimination under Section 202(a) of the Act. MCI maintains that in each instance, the 800 Services provided to each group of users are "like" telecommunications services within the meaning of the Act. MCI argues that the only difference between the two user groups is price, which constitutes an unreasonable discrimination between directly served and indirectly recruited AT&T customers. According to MCI, AT&T has selective price reductions for rate sensitive customers while maintaining regular rates for non-rate sensitive customers. MCI contends that there is no justification, cost or otherwise, for the difference in rates to these similarly-situated users, other than the fact that some subscribed through aggregators and others did not.[24]

15. AT&T challenges MCI's claim that its provision and marketing of tariffed discount pricing plans for 800 Service constitute unreasonable discrimination between end users who subscribe directly from AT&T and end users who subscribe indirectly from resellers. AT&T maintains that Section 202(a) does not apply to this case because Section 202(a) prohibits one carrier from charging unreasonably discriminatory rates for like services. In this case, AT&T asserts, there are two carriers providing different services -- AT&T as the underlying carrier and the aggregator as a reseller of AT&T's services. AT&T states that in any event, the volume and term discount plans are generally available to all qualified customers, including resellers, under the same terms and conditions.

Discussion

16. We are not persuaded by MCI's contentions that AT&T unlawfully discriminates between end users who subscribed through the traffic aggregators and end users who subscribed through AT&T representatives. It is clear that each group of end users received AT&T 800 service. We agree with AT&T, however, that no discrimination occurred because there are two carriers involved--the underlying carrier, AT&T, and the resale carrier, the aggregator. Section 202(a) of the Act does not apply because that provision prohibits different rates for like services offered by one carrier. This is not a case where a single carrier has charged one rate to users who subscribe directly and another rate to users who subscribe indirectly to the same carrier through third parties or agents. On the contrary, it is clear that two carriers are involved, with the aggregator assessing a fee upon its customers.[25] Under these circumstances, we find no merit in MCI's claim that AT&T's actions constitute unreasonable discrimination within the meaning of Section 202(a).

D. Section 203 Analysis

Statement of the Issue

17. MCI claims that AT&T's tariffs lack "precision and clarity" and therefore violate Section 203 of the Act and Sections 61.54(j) and 61.2 of the Commission's Rules.

Positions of the Parties

18. MCI argues that AT&T's Tariff FCC No. 2 violates Section 203 of the Act and Sections 61.2 and 61.54(j) of the Commission's Rules because the tariff does not clearly define AT&T's customer relationship with its aggregators and end users. MCI contends that because AT&T's tariff treats both the aggregator and the end user as "customers", it is unclear whether each of these "customers" is separately or jointly responsible for fulfilling the terms and conditions contained in AT&T's 800 Service term and volume discount tariffs.[26] As additional support for its claim that AT&T's tariffs lack precision and clarity, MCI states that after MCI filed its complaint, AT&T attempted to modify its tariff to better characterize AT&T relations with the "customer of record" and the "customer" for service.[27]

19. AT&T responds that the definition of "customer" in its tariffs is clear and unambiguous and fully complies with the Act nd Commission Rules. AT&T asserts that the purchaser of RVPP or CSTP is AT&T's customer. As subscriber to the plans, AT&T explains, the aggregator/reseller assumes the general obligations under AT&T's tariffs, including responsibility for placement of orders, payment of bills and compliance with tariff regula-

[24] Complaint at para. 15.

[25] Aggregators assess a fee to the end users which is higher than the discount rate but lower than the non-discount rate. *See, e.g.* Advance Network Design Answer at para. 10, stating that end users are charged a fixed percentage of the amount of savings obtained as a result of aggregation.

[26] Complaint at para. 21.

[27] Reply at 8.

tions.[28] AT&T states that it is clear under the tariffs that the end user is the reseller's customer, not AT&T's.[29] AT&T maintains that there is no basis for MCI's claim that its tariffs establish dual customers for the same 800 Service.

Discussion

20. The Commission's Rules require that carrier tariffs contain clear and precise language, including descriptions and definitions.[30] We agree with MCI's contention, that AT&T's tariff is unclear as to who was responsible for fulfilling the terms and conditions of the RVPP and CSTP plans. We reach this conclusion notwithstanding AT&T's subsequent modification of the tariff language to describe in greater detail the extent of liability of the customer of record and of the end users. Under the revised language, AT&T holds the customer of record jointly and severally liable with the end users of each designated location for charges incurred by that location.[31] AT&T's tariff continues to be unreasonably vague in that it treats both the aggregator and in essence, the end user as "customers" for purposes of certain payment liability. Under the tariff, the subscriber to the RVPP or CSTP plan (here, the aggregator) is AT&T's customer of record, but the bill for the service is initially presented to the end user for each designated location, who is not a customer but is nonetheless jointly and severally liable with the customer as specified in the tariff.[32] In its pleadings, however, AT&T maintains that the aggregator is AT&T's customer and that the end user is the aggregator's customer. AT&T also states that the direct billing to the aggregator's customer is done essentially as a matter of convenience and that the aggregator is ultimately responsible for all tariffed charges. We find AT&T's claims to be unpersuasive. Because the plain language of the tariff holds both the aggregator and the end user liable for payment, we find that it lacks clarity and specificity with respect to the aggregator's liability as a customer of AT&T.

IV. CONCLUSION AND ORDERING CLAUSES

21. We cannot find in this record that AT&T's policies and practices in connection with its volume and term discounts constitute unjust and unreasonable practices under Section 201 or unreasonable discrimination under Section 202 of the Act.[33] We find, however, that AT&T's tariff lacks precision and clarity in violation of Section 203 of the Act and Sections 61.2 and 61.54(j) of the Rules. Therefore, we will require AT&T to modify its tariff language to conform to the requirements of Section 203 of the Act and Sections 61.2 and 61.54 of the Rules within 30 days of the release date of this Order.

22. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by MCI Telecommunications Corporation on October 11, 1989, IS GRANTED to the extent indicated above and otherwise IS DENIED.

23. IT IS FURTHER ORDERED THAT AT&T shall file a modification to its Tariff No. 2 consistent with the guidelines discussed in Section III of this Order and in conformity with the Act and the Commission's Rules. Such filing shall be made no later than thirty days from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[28] Answer at 8.

[29] Motion to Dismiss at 5, *citing Resale and Shared Use Order* where the Commission stated that "Thus, the end user is the broker's customer, just as the broker is the customer of the underlying carrier."

[30] 47 CFR § 61.54(j) provides in pertinent part: "The general rules (including definitions), regulations, and conditions which govern the tariff must be stated clearly and definitely....A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate."

[31] The tariff also explains that AT&T initially seeks payment from the end user location. If the end user location defaults, the customer/aggregator is responsible for payment. *See* AT&T Transmittal No. 1979, filed December 19, 1989 (RVPP); AT&T Transmittal No. 1991, filed December 22, 1989 (CSTP).

[32] *See e.g.*, AT&T Tariff FCC No. 2, Section 2.9, stating that the customer is the person or entity which directly or indirectly orders the service.

[33] We note that MCI's damages claims rested on its contention that AT&T had violated Sections 201(b) and 202(a) of the Act. Our finding that AT&T's tariff lacks the precision and clarity required by Section 203 of the Act and the Commission's Rules does not appear to raise an issue of damages.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG DISTANCE COMPANY,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES, and — File No. E-89-401
NEW JERSEY BELL TELEPHONE COMPANY, — File No. E-89-402
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: July 31, 1992; Released: August 10, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, MidAmerican Long Distance Company (MidAmerican) filed the above-captioned complaints seeking damages resulting from the defendants' alleged violations of the Commission's rate of return prescription for the period October 1, 1985 to December 31, 1986. On July 13, 1992, the defendants requested that the complaints be dismissed on the grounds that the complainant had not purchased interstate access services from them during the relevant period. On July 24, 1992, MidAmerican filed a reply to defendants' motion to dismiss stating that although it does not agree that it did not take service, it does not oppose dismissal of the complaints.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the defendants' request for dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that MidAmerican's Application for Review filed in the above-captioned proceedings IS DISMISSED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

[1] MidAmerican filed an application for review of an order holding the above-captioned proceeding in abeyance. *Order*, 6 FCC Rcd 642 (Com.Car.Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-164

In the Matter of

Amendment of Part 80 of the Commission's Rules Concerning Class C Emergency Position Indicating Radio Beacons. RM-7838

NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1992; Released: August 10, 1992

Comment Date: September 21, 1992
Reply Comment Date: October 6, 1992

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to amend Part 80 of our Rules, 47 C.F.R. Part 80, to phase out the use of Class C Emergency Position Indicating Radio Beacons (EPIRBs) after February 1, 1999. This *Notice* was initiated by a petition for rule making from the United States Coast Guard (Coast Guard).[1]

II. BACKGROUND

2. EPIRBs are small, battery powered transmitters carried on ships for the purpose of sending a distress signal. The distress signal is used both as an alarm to alert others that a ship is in distress and as a beacon to aid in its location by search and rescue (SAR) personnel. EPIRBs may be activated automatically or manually. There are two general classes of EPIRBs, those primarily intended to be detected by satellite (satellite EPIRBs)[2] and those intended to be detected by nearby ship or coast stations (Class C EPIRBs). Satellite EPIRBs are used in conjunction with the COSPAS-SARSAT system of polar orbiting satellites that employ dedicated receivers to detect distress signals.[3] These satellites relay the EPIRB's distress signal and calculated position to SAR personnel. Class C EPIRB distress signals, however, are transmitted alternately on channels the COSPAS-SARSAT system does not receive. The distress signal is transmitted for a short period on marine VHF channel 16 for alerting, and a long period on marine VHF channel 15 to allow SAR personnel to "home in" on the signal.[4] Further, because Class C EPIRBs transmit at very low power, the effective range of the distress signal is limited, and ships in distress must rely on nearby stations to detect and respond to Class C EPIRBs' signals.

3. Both the Coast Guard and the Commission require certain vessels to carry EPIRBs for safety purposes. The Coast Guard, for example, requires all ocean going cargo ships and passenger ships certified for ocean service or coastwise service more than 20 miles from a harbor to carry a satellite EPIRB. The Coast Guard also requires certain vessels certified for Great Lakes service to carry one or sometimes two Class C EPIRBs.[5] The Coast Guard, however, will accept one 406 EPIRB as equivalent to two Class C EPIRBs. The Commission recently adopted regulations implementing the Global Maritime Distress and Safety System (GMDSS) which will require all passenger ships and all large cargo ships on international voyages to install a 406 EPIRB by August 1, 1993.[6] Under the Commission's Rules, recreational boats and small commercial vessels are not required to carry an EPIRB but may be authorized to equip with either a satellite EPIRB or Class C EPIRB.

III. DISCUSSION

4. In its petition, the Coast Guard requests that the Commission eliminate authorization of Class C EPIRBs by February 1, 1999.[7] The Coast Guard points out that the GMDSS, which will be mandatory in 1999, changes the mandatory watch requirement for vessels from marine VHF channel 16 to an automated watch on Digital Selective Calling (DSC) Channel 70 (156.525 MHz).[8] In conjunction with this change the Coast Guard states that it intends to discontinue its aural watch on VHF Channel 16 in 1999.[9] These changes, according to the Coast Guard, will dramatically reduce the effectiveness and need for Class C EPIRBs in SAR operations. The Coast Guard favors allowing only satellite EPIRBs which it claims are widely used and much more effective in SAR incidents than EPIRBs that rely on nearby stations. The Coast Guard contends that informing the maritime community

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[1] RM-7838, Report 1866, October 28, 1991.

[2] We are using the term satellite EPIRB in this *Notice* to include all categories of EPIRBs capable of being detected by satellite. Additionaly, the term "406 EPIRB" refers to EPIRBs that operate on the frequency 406.025 MHz. *See* 47 C.F.R. §§ 80.1053, 80.1055, 80.1059 and 80.1061.

[3] COSPAS-SARSAT is a joint international satellite-based search and rescue system established by Canada, France, the USSR, and the United States to detect and locate emergency radiobeacons (EPIRBs) transmitting on 121.5 MHz or 406.025 MHz. The U.S. satellites in this system also monitor 243.0 MHz.

[4] Marine VHF channel 16 is the international safety, distress and calling channel. Marine VHF channel 15 is used for environmental transmissions and Class C EPIRB distress transmissions.

[5] *See* U.S. Coast Guard Navigation and Vessel Inspection Circular No. 9-91, May 31, 1991.

[6] The GMDSS is an automated ship-to-shore distress alerting system that relies on satellite and advanced terrestrial systems. The GMDSS regulations apply to cargo ships of 300 tons gross tonnage and over on international voyages or in the open sea, and to ships carrying twelve passengers or more irrespective of size on international voyages or in the open sea. These ships are termed "compulsory ships." *See Report and Order*, PR Docket 90-480, 7 FCC Rcd 951 (1992).

[7] Implementation of the GMDSS commenced on February 1, 1992. The system is scheduled to be fully implemented by February 1, 1999.

[8] There is no VHF channel 15 watch requirement.

[9] Coast Guard petition at 1.

now that the Commission intends to eliminate authorization of Class C EPIRBs by February 1, 1999, will allow for amortization of existing Class C EPIRBs and provide sufficient time for the marine public to obtain another type of EPIRB prior to the full implementation of the GMDSS.[10]

5. By February 1, 1999, all passenger and large cargo ships must comply with the automated watch on DSC channel 70 requirement thus reducing the number of stations required to monitor channel 16. Further, the Coast Guard indicates that it intends to discontinue its watch on marine channel 16 at that time. We believe that the Coast Guard is correct in its assessment that Class C EPIRBs will become ineffective for safety purposes once these changes are implemented. Further, the Coast Guard is currently recommending that ships use satellite EPIRBs in place of Class C EPIRBs. We are proposing, therefore, to phase out the use of Class C EPIRBs. Our intent is to promote the safety of life and property at sea and to minimize the differences between Commission and Coast Guard requirements.

6. We do not believe this proposal will have a significant impact on the maritime community because there are currently only two manufacturers of Class C EPIRBs and relatively few users. Nevertheless, to allow for the amortization of manufacturers' existing stock of Class C EPIRBs, we are proposing rules that would permit the manufacture, importation, sale, and installation of Class C EPIRBs until February 1, 1995. Additionally, to provide sufficient time for current users to obtain other EPIRBs, we propose to grandfather the use of Class C EPIRBs until February 1, 1999. Although this proposed schedule should provide for an orderly transition to other types of EPIRBs, we specifically request comments on whether there are other circumstances which the Commission should consider in determining whether to phase out the use of Class C EPIRBs.

IV. PROCEDURAL MATTERS

Ex Parte Rules-Non-Restricted Proceeding

7. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

8. The Commission hereby certifies pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), that these rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. There are only two manufacturers of Class C EPIRBs and these devices currently are not widely marketed or used in the maritime community. The Secretary shall send a copy of this *Notice*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

Comment Dates

9. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules (47 C.F.R. §§ 1.415 and 1.419) interested parties may file comments on or before **September 21, 1992** and reply comments on or before **October 6, 1992.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive personal copy of their comments, an original and nine copies must be filed. Comments and rely comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

10. Authority for issuance of this *Notice* is contained in Sections 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

11. For further information concerning this docket contact Roger Noel, Aviation & Marine Branch, Private Radio Bureau, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Proposed Rules

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

A. PART 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.15 is amended by revising paragraph (e)(1) as follows:

§ 80.15 Eligibility for station license.

[10] *Id.*

* * * * *

(e) EPIRB stations. (1) New class C EPIRB stations will not be authorized after February 1, 1995. Class C EPIRB stations installed and licensed before February 1, 1995, will be authorized until February 1, 1999:

(i) * * *

* * * * *

3. Section 80.205 is amended by adding a new Footnote 13 to the "G3N" entry in the table in paragraph (a) to read as follows:

80.205 Bandwidths

(a) * * *

G3N[3,13].....

* * * * *

[13] Class C EPIRB stations will not be authorized after February 1, 1999.

* * * * *

4. Section 80.207 is amended by adding a new Footnote 13 to the "156.750 and 156.800 MHz" entry in the table in paragraph (d) to read as follows:

80.207 Classes of emission

* * * * *

(d) * * *

156.750 and 156.800 MHz[13]

* * * * *

[13] Class C EPIRB stations will not be authorized after February 1, 1999.

5. Section 80.209 is amended by adding a new Footnote 6 to the "Operating on 156.750 and 156.800 MHz" entry in the table in paragraph (a) to read as follows:

80.209 Transmitter frequency tolerance

(a) * * *

(5) * * *

(iv) * * *

Operating on
156.750 and
156.800 MHz[6]

* * * * *

6 Class C EPIRB stations will not be authorized after February 1, 1999.

6. Section 80.1057 is revised by adding an initial paragraph as follows:

80.1057 Special requirements for Class C EPIRB stations

Class C EPIRBs shall not be manufactured, imported, or sold in the United States after February 1, 1995. Class C EPIRB stations installed on board vessels before February 1, 1995, will be authorized until February 1, 1999.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-208

In re Applications of

ATLANTIC RADIO COMMUNICATIONS, INC.	File No. BPH-900116MS
GREAT AMERICAN COMMUNICATIONS CORP.	File No. BPH-900117MN
JOHN SENIOR BROADCASTING CORP.	File No. BPH-900117MP
JERSEY DEVIL BROADCASTING COMPANY	File No. BPH-900117MT
SEAIRA, INC.	File No. BPH-900117MU
SOUTHERN OCEAN BROADCASTING COMPANY	File No. BPH-900117MX
LD BROADCASTING LIMITED PARTNERSHIP	File No. BPH-900117NA

For Construction Permit for New
FM Station, Channel 289B1,
Manahawkin, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1992; Released: August 10, 1992

By the Commission:

1. The Commission has before it a decision of the Review Board denying Seashore Broadcasting Corporation's (Seashore) Petition to Intervene, dismissing Seashore's appeal from a decision of Administrative Law Judge Arthur I. Steinberg (ALJ), and declining to review the ALJ's decision on its own motion. *Memorandum Opinion and Order*, 7 FCC Rcd 486 (Rev. Bd. 1992) (*MO&O*). The ALJ's decision approved a settlement agreement among applicants for a new FM station at Manahawkin, New Jersey, and granted the application of Press Broadcasting Company (Press). *Memorandum Opinion and Order*, FCC 91M-2893, released September 23, 1991 (*MO&O II*). After carefully reviewing the record in this proceeding and the pleadings before us,[1] we conclude that the Review Board erred in dismissing Seashore's appeal and in affirming the ALJ's decision. Accordingly, we hereby reverse both the Review Board decision and the underlying ALJ decision.

2. The Review Board denied Seashore's October 23, 1991 Petition to Intervene and appeal on the grounds that, to challenge the ALJ's decision approving the settlement agreement, Seashore needed to meet the standards of 47 C.F.R. § 1.223(c), concerning the acceptance of late-filed petitions to intervene, and that Seashore had failed to do so.[2] For the reasons stated below, we conclude that Seashore already had party-in-interest status in this proceeding and that therefore the Review Board should have considered Seashore's appeal on its merits.

3. Seashore initially participated in this proceeding when it filed a Petition to Deny the application of Jersey Shore Broadcasting (Jersey Shore), one of twelve applicants for the new Manahawkin facility.[3] The Mass Media Bureau agreed with Seashore's arguments that Jersey Shore had violated the inconsistent application rule in filing the Manahawkin application and dismissed the application.[4] It also dismissed the application of Press Broadcasting Company (Press) for violating the inconsistent application rule.[5] That rule, 47 C.F.R. § 73.3518, forbids the simultaneous prosecution of two applications both of which cannot be granted because they are inconsistent either on their face or in the context of other rules.

4. In most circumstances, the dismissal of Jersey Shore's application would have ended Seashore's interest in the proceeding, but the circumstances of this case are unique. Specifically, after adoption of the *HDO* dismissing the Press and Jersey Shore applications but prior to its release, the applicants submitted to the Mass Media Bureau a joint request for approval of a settlement agreement contemplating the grant of the Press application and the dismissal of all other applications. As part of the settlement agreement, Press and Jersey Shore entered into an option agreement pursuant to which Jersey Shore can, upon grant of a construction permit to Press, and after Press has commenced program test authority, swap its existing Class A Manahawkin station (WJRZ) for Press' new Class B1 facility.[6]

5. After release of the *HDO* dismissing both the Press and Jersey Shore applications, the settlement agreement was resubmitted to the ALJ. To save the agreement, he permitted LD Broadcasting Limited Partnership (LD) to amend its application to substitute Press for LD and granted that application.[7] However, despite the fact that he ruled on all other aspects of the multi-party settlement, he declined to rule on the Press/Jersey Shore agreement. He reasoned that, since the Jersey Shore application had been dismissed, Jersey Shore was no longer a party to the proceeding and he had no jurisdiction over Jersey Shore's agreement with Press. He therefore referred that agreement to the Mass Media Bureau,[8] where Jersey Shore's Petition for Reconsideration of the dismissal of its application was pending. The Mass Media Bureau approved the agreement on September 27, 1991.[9]

6. We see no justification for this bifurcated approach in considering the settlement agreement. While Jersey Shore was no longer a party before the ALJ, the Press/Jersey Shore agreement was an integral part of the settlement package, and the ALJ should not have excised it for separate review by the Mass Media Bureau. Furthermore, we conclude that, since under the terms of the Press/Jersey Shore agreement, Jersey Shore may ultimately become the permittee of the Manahawkin facility, Seashore, having established its status as a party in interest for purposes of petitioning to deny Jersey Shore's application, was already a party in interest for purposes of objecting to the

Press/Jersey Shore settlement agreement, and its appeal of the ALJ's decision should have been considered.[10] This conclusion seems especially apparent in light of the fact that, if the Press/Jersey Shore option is exercised and Jersey Shore becomes the ultimate licensee of the Manahawkin facility, the dismissal of Jersey Shore's application in the *HDO* would be effectively negated. That dismissal occurred specifically in response to matters raised in Seashore's Petition to Deny.[11] Accordingly, we reverse the Review Board's decision dismissing Seashore's appeal and turn to the merits of the appeal.

7. We agree with Seashore that the ALJ failed to give proper consideration to the inconsistent application rule, 47 C.F.R. § 73.3518, in approving the settlement agreement. That rule, and *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493 (1987), concerning its application, required the dismissal of both the Press and Jersey Shore applications as initial matters. Therefore the grant of the construction permit to Press pursuant to the terms of the settlement agreement and the Press/Jersey Shore option to "swap" which may make Jersey Shore the ultimate licensee are void.

8. As filed, Press' Manahawkin application was inconsistent with its 1989 application for an Ocean Acres, New Jersey station.[12] In *Big Wyoming* and other more recent cases we have upheld decisions dismissing the later-filed of an applicant's inconsistent applications rather than permitting the applicant to choose which application to pursue and then to amend as necessary to eliminate the inconsistency. *See e.g., New Life Enterprises, Inc.*, 7 FCC Rcd 843 (1992); *Premier Broadcasting, Inc.*, 7 FCC Rcd at 867. As we explained in *Big Wyoming*, we cannot allow applicants to choose which of two inconsistent applications they want to pursue because they might choose to dismiss the first application, which has already been processed. This result would mean that Commission resources have been wasted and service to the public unnecessarily delayed. *Big Wyoming* at ¶ 10. It does not "cure" Press' violation of 47 C.F.R. § 73.3518 that it promised to, and did, request dismissal of its Petition for Reconsideration of the dismissal of the Ocean Acres application if the settlement agreement granting it the Manahawkin permit was approved. The violation occurred upon the act of filing the Manahawkin application. *Big Wyoming* at ¶ 6. The violation could not be cured "because the act of filing cannot be undone." *Id.*[13] The only appropriate result was the dismissal of Press' Manahawkin application. *Id.*

9. Likewise, as filed, Jersey Shore's Manahawkin application, was inconsistent with an application for a Tuckerton, New Jersey station that it filed on the same day.[14] This was a clear violation of the inconsistent application rule,[15] and again the only appropriate result was the dismissal of the application with the later file number. In this case, since Jersey Shore's Tuckerton application was given the earlier file number, the Manahawkin application was properly dismissed in the *HDO*.[16] Again, it does not negate the violation that Jersey Shore ultimately requested the dismissal of the Petition for Reconsideration of the *HDO* dismissing the Manahawkin application;[17] the rule violation could not be undone.

10. The ALJ nonetheless approved the settlement agreement, a result which means that both the initial permittee of the Manahawkin facility and, assuming the Press/Jersey Shore option is exercised, the ultimate licensee of the facility, will be entities that blatantly violated 47 C.F.R. § 73.3518 in filing their Manahawkin applications. In short, the decision permits the parties to accomplish through a creative settlement agreement what they could not have accomplished directly through the application process. We here conclude that our holding in *Big Wyoming* extends to the current situation, so that dismissal of an application for violation of 47 C.F.R. § 73.3518 precludes the applicant from further participation in a proceeding, including participation in any settlement. While we realize that overturning the ALJ's contrary decision may result in a lengthy comparative hearing that will further tax the Commission's limited resources, we believe we must do so to avoid future abuse of 47 C.F.R. § 73.3518 and to protect the integrity of our rules generally.[18]

11. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the application for review filed February 18, 1992 by Seashore Broadcasting Corporation IS GRANTED.

12. IT IS FURTHER ORDERED, That the Review Board decision in this matter, 7 FCC Rcd 486 (Rev. Bd. 1992), IS VACATED.

13. IT IS FURTHER ORDERED, That the decision of Administrative Law Judge Steinberg approving the settlement in this matter, *Memorandum Opinion and Order*, FCC 91M-2893, released September 23, 1991, IS VACATED, the Joint Request for Approval of Settlement Agreements submitted to Judge Steinberg by the parties to the settlement on August 16, 1991 IS DENIED, and the case IS REMANDED to Judge Steinberg for further proceedings in accordance with the *Hearing Designation Order* in this case, 6 FCC Rcd 4716 (1991).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Seashore filed an Application for Review of the Review Board's decision on February 18, 1992. Seven parties to the proceeding filed a consolidated Opposition to Seashore's pleading on March 4, 1992. The Mass Media Bureau also filed an Opposition to Seashore's pleading on March 4, 1992.

[2] The Board reasoned that Seashore's Petition to Intervene was late-filed because the *Hearing Designation Order* in this matter appeared in the Federal Register on August 6, 1991. *Hearing Designation Order*, 6 FCC Rcd 4716 (1991) (*HDO*). Pursuant to 47 C.F.R. § 1.223, Petitions to Intervene were due on September 11, 1991, and Seashore's Petition was not filed until October 23. Section 1.223(c) requires that persons submitting late-filed Petitions "set forth the interest of petitioner in the proceeding, show how such petitioner's participation will assist the Commission in the determination of the issues in question, . . . set forth any proposed issues in addition to those already designated for hearing, and set forth the reasons why it was not possible to file a petition within [30 days after publication in the Federal Register of the hearing issues or any substantial amendment thereto]."

[3] Seashore had standing as a party-in-interest for purposes of filing the Petition to Deny because it would be a competitor of the future Manahawkin station. 47 U.S.C. § 309(d); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

[4] *HDO* at 4717 ¶ 8.

[5] *HDO* at 4718 ¶ 12.

[6] In its application, Jersey Shore had proposed to divest its existing Manahawkin facility if it obtained the permit for the new Manahawkin facility. However, the application was dismissed as an inconsistent application because, on the same day that Jersey Shore filed the Manahawkin application, it also filed an application for a new facility in Tuckerton, New Jersey which was given an earlier file number (BPH-900117MV), and the contours of the proposed Tuckerton and Manahawkin facilities overlapped.

[7] At the same time, Press requested the unconditional dismissal of the Petition for Reconsideration of the dismissal of its Ocean Acres, New Jersey application. The predicted city-grade contours of the Ocean Acres facility and the Manahawkin facility would have overlapped in violation of 47 C.F.R. § 73.3555 and therefore the applications were "inconsistent." By ceasing to prosecute the Ocean Acres application, Press purportedly eliminated the violation of the inconsistent application rule that had caused the dismissal of its Manahawkin application.

[8] *MO&O*, FCC 91M-2893 at n.4.

[9] Seashore sought reconsideration of the approval of the Press/Jersey Shore agreement. Reconsideration was denied on the grounds that Seashore had no standing. Letter of March 13, 1992 from Larry D. Eads, Chief, Audio Services Division, to William D. Silva, attorney for Seashore (8920-MAT). On April 13, 1992, Seashore filed an Application for Review of the denial.

[10] Under this analysis, Seashore's appeal of the ALJ's decision was timely because it submitted the appeal to the Review Board within the time-frame permitted for the filing of such pleadings by parties.

[11] The Review Board concluded that any consideration of the option agreement is premature until the option is exercised. *MO&O* at n.3. We disagree. As indicated, we believe the Press/Jersey Shore agreement, including the option agreement, was a critical part of the settlement package and should have been considered together with the rest of the package.

[12] *See* n.7, *supra*. Although the Ocean Acres application had been dismissed, Press' Petition for Reconsideration of the dismissal was still pending and therefore the application was pending. *Premier Broadcasting, Inc.*, 7 FCC Rcd 867 ¶ 5 (1992) (for purposes of the inconsistent application rule, there is "no relevant distinction between applications that have been returned and other types of pending applications"). *Cf.* 47 C.F.R. § 1.65 and 47 C.F.R. § 73.3525 (for purposes of amendments and settlement agreements, applications are considered pending before the Commission until the grant or denial of the application is no longer subject to reconsideration or review).

[13] Nor is the fact of the violation altered by Press' request for a waiver of 47 C.F.R. § 73.3518, filed simultaneously with the Manahawkin application. That request was in reality a request to pursue whichever application was successful, with Press specifically stating that, if the Commission determined the Ocean Acres application was not properly returned, "Press would then...elect which application it would pursue."

[14] *See* n.6, *supra*.

[15] Jersey Shore also filed a waiver request that clearly was a request for permission to choose between Tuckerton and Manahawkin at a later date, depending on which application proved successful.

[16] *HDO* at ¶ 6.

[17] Jersey Shore made the request in consideration for the option from Press, and the Mass Media Bureau granted the request at the same time that it approved the Press/Jersey Shore agreement.

[18] In light of our conclusion that the application of 47 C.F.R. § 3518 to the facts of this case requires overturning the ALJ's decision approving the settlement, we need not reach here Seashore's other arguments concerning the validity of the settlement.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: August 10, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

WPNT, Inc.	8310-HTS
Licensee,	91090673
Radio Station KHTK(FM)	91090556
7 Parkway Center	
STE 780	
Pittsburgh, Pennsylvania 15220	

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture of twenty-five hundred dollars ($2,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. The Notice of Apparent Liability is issued because of your apparent violation of 18 U.S.C. Section 1343. This section states that anyone devising or intending to devise a scheme for obtaining money by means of false or fraudulent pretenses, representations or promises that uses radio for the purpose of executing the scheme shall be fined not more than one thousand dollars ($1,000) or imprisoned not more than five years, or both. Sections 503 and 312 of the Communications Act of 1934, as amended, empower the Commission to impose forfeitures or revoke licenses for violations of Section 1343.

BACKGROUND

On July 8, 1991, we sent you a letter of inquiry requesting information about an announcement that aired on Radio Station KHTK(FM) that may have violated the radio fraud statute under Title 18 United States Code Section 1343. Although the announcement requested individuals to send money to help rebuild the station's tower, which had been destroyed in a storm, it appears that the tower damage was covered by insurance and you instead donated the money raised to charity.

On September 19, 1991, you submitted a Response to our inquiry. In that Response, you stated that you aired the subject announcement four times per day on the radio from April 1, 1991 to April 12, 1991. You acknowledged that the announcement mentioned that a storm destroyed the tower but also explained that the announcement described a series of disasters, including a tornado, an ice storm and a wind storm, which interfered with the station's operations. The announcement also requested a dollar from each listener to help rebuild the tower and ensure that the DJs would not lose their jobs. You admitted that the money was not used to repair the station's tower because the tower was covered by insurance and that you instead donated the money to a local charity. You further explained that you received ninety-eight dollars ($98) from listeners. Those individuals who sent money to you and who identified themselves were informed that their money went to a local charity and were given free cassettes or CDs of their choice. You explained that you did not inform your other listeners that the tower's repairs were covered by insurance, that the DJs' jobs were not in jeopardy and that the money was donated to charity, as you believed that such an explanation was unnecessary.

You defended your actions by stating that the announcement was a joke and a light-hearted way of poking fun at disasters that befell the station." [The station] never intended the announcement to be a means of raising money under false pretenses." In support, you argued that the mere ninety-eight dollars ($98) raised indicated that listeners did not take the announcement seriously. On the basis of the information before us, we do not accept your argument that the announcement was a joke and find that you have apparently violated Section 1343 of Title 18 of the United States Code.

DISCUSSION

The elements of a fraud violation under Section 1343 are (1) the formation of a scheme to defraud, and (2) the use of interstate communications to further that scheme.[1] Because the announcement aired on the radio, the second element is satisfied.

There is no standard definition of a scheme to defraud. In essence, however, "a scheme to defraud is a plan to deceive persons as to the substantial identity of the things they are to receive in exchange."[2] Deception occurs if the reasonable or probable effect of the representation would be to deceive or mislead a person of ordinary prudence.[3] Proving that an individual contemplated some actual harm or injury is also an important factor considered.[4]

The scheme must be carried out with specific intent to deceive.[5] An intent to defraud is defined as an act undertaken "wilfully and with specific intent to deceive or cheat, ordinarily for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self."[6] Specific intent does not mean that defendant knows how his actions violate the law or even that defendant intended to violate the law.[7]

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[1] *United States v. Lemire*, 720 F.2d 1327, 1334-35 (D.C. Cir. 1983).
[2] *United States v. Brien*, 617 F.2d 299, 307 (1st Cir. 1980), *cert. denied*, 446 U.S. 919 (1980).
[3] *United States v. Louderman*, 576 F.2d 1383, 1388 (9th Cir. 1978), *cert. denied*, 439 U.S. 896. *But see generally, United States v. Brien*, 617 F.2d 299, 311 (1st Cir. 1980), *cert. denied*, 446 U.S. 919 (noting divergence of opinion on whether to apply a gullible or an ordinary prudence standard).
[4] *United States v. Lemire*, 720 F.2d 1327, 1341 (D.C. Cir. 1983).
[5] *United States v. Carpenter*, 791 F.2d 1024 (1986), *affirmed*, 484 U.S. 19.
[6] *United States v. Lemire*, 720 F.2d 1327, 1341 (D.C. Cir. 1983).
[7] *United States v. Bibby*, 752 F.2d 1116, 1124 (6th Cir. 1985).

To determine whether an individual had intent, a "totality of the circumstances" test is used.[8] The following factors are considered when applying the test: whether defendant acted with reckless disregard for the truth;[9] whether he avoided knowledge of the scheme;[10] whether he made affirmative misrepresentations by statements, acts or omissions;[11] and whether the aggrieved party relied on these misrepresentations.[12]

While you argued that you did not have the intent to defraud listeners when you aired the announcement, intent can be inferred from the circumstances. You affirmatively misrepresented facts to your listeners. You informed listeners that the money would be used for tower repairs and that if you did not repair the tower, the DJs would be fired. Both statements were untrue. Because the tower repairs were covered by the station's insurance, the DJs' jobs were secure and the money was not used for the tower repairs. You admit in your Response that "no indication was given in the announcement that collected funds were going to be donated to a local charity." Yet, this, in fact, occurred. Thus, you asked for money based on false pretenses or, at a minimum, with reckless disregard for the truth.

Additionally, listeners relied on your misrepresentations and sent money to help you repair the tower. Thus, listeners were harmed. They lost money and lost control over how their money was spent. If they had known the money was going to be given to charity, they might have chosen a different charity or not sent the money to the station at all.

Further evidence of your intent to deceive is your failure to return the money or, at the least, your failure to give people the opportunity to have their money returned to them. Additionally, you never informed other listeners who had sent money to you or had just listened to the announcement that the station's tower was covered by insurance, that no money was needed and that the money raised had been donated to charity.

You defended your actions by stating that you did not intend to commit a fraud, you raised only ninety-eight dollars ($98) and the announcement was a joke. These defenses suggest that you believe you acted in good faith without intent to deceive and were unaware that your actions constituted a fraud violation. We recognize that individuals who act in good faith without the intent to defraud, even if such action is unreasonable, are not guilty of fraud.[13] But your lack of intent is not supported by the evidence. You never had the good faith intent of using the money raised to repair the tower because the repairs were covered by insurance. You knew that you promised individuals something in exchange for their money and did not fulfill this promise. And a good faith defense is not available to an individual who first made representations in good faith and later realized that the representations were false and deliberately continued to make them.[14] Even if you, at first, intended the announcement to be taken as a joke, a good faith defense is not available in this case because you continued to air the announcement for twelve days. This is especially true if you received listeners' money during the twelve days that the announcement aired as this would indicate listeners did not believe it was a joke and be further evidence of your intent to deceive or, at the least, your reckless indifference to the truth.

You also contended that the station raised only ninety-eight dollars ($98), thereby indicating that listeners did not take the announcement seriously and knew that the announcement was a joke. The success of the scheme or the dollar amount raised is irrelevant to a fraud violation as the focus is on the scheme to defraud. Thus, the aggrieved party's harm or defendant's benefit is irrelevant.[15] And, that is why the fact that you donated the money to charity, instead of using it for your own purposes, is immaterial. Conversion of money to one's own use is not an essential part of the violation.[16]

While success of the scheme is not required to prove a fraud violation, it is helpful in proving intent. While you implied that ninety-eight dollars is insignificant, in this instance, raising ninety-eight dollars is a "success." The announcement solicited one dollar from every listener. The fact that ninety-eight individuals responded to the request (or that several people sent more than the one dollar requested) and believed your plea for money to help repair the tower was sincere contradicts your assertion that it was a joke. Including the station's address to which donations could be sent, also strongly suggested to the audience that your plea was sincere.

Finally, by stating in the Response that the announcement was a joke, you admitted it was untrue and implied it was intended to deceive the listeners. Moreover, your claim is undermined by the facts. The announcement did not contain any words indicating that it was a joke. Airing the announcement for twelve days in a row, four times per day, is inconsistent with it being a joke and, to listeners, it would have seemed more like a *bona fide* campaign to raise money. And, after the money was raised, failing to inform listeners that the announcement was a joke, apologize to those individuals who sent you the money, or return the money, further weakens your claim.

In sum, it appears you have repeatedly violated Section 1343 of Title 18 of the United States Code, having announced your solicitation request four times per day for 12 days. This plan deceived people as you promised that the money would be used for the tower's repairs but donated it to charity. There is evidence that the scheme to defraud would defraud a person of ordinary prudence, as it succeeded in misleading a number of individuals.

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[8] *United States v. Alston*, 609 F.2d 531, 538 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 918.

[9] *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982), *cert. denied*, 461 U.S. 932 (making extravagant claims of success for an invention in order to get investors).

[10] *United States v. Ramsey*, 785 F.2d 184 (7th Cir. 1986), *cert. denied*, 476 U.S. 1186, 1189.

[11] *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982), *cert. denied*, 461 U.S. 932.

[12] *United States v. Ranney*, 719 F.2d 1183, 1188 (1st Cir. 1983).

[13] *United States v. Mann*, 884 F.2d 532, 536 (10th Cir. 1989). Courts will also consider whether defendant's acts were done inadvertently or mistakenly. *United States v. Sheiner*, 273 F. Supp. 977, *affirmed*, 410 F.2d 337, *cert. denied*, 396 U.S. 825.

[14] *United States v. Lamont*, 565 F.2d 212 (1977), *cert. denied*, 435 U.S. 914.

[15] *United States v. Lemire*, 720 F.2d 1327, 1341 (D.C. Cir. 1983).

[16] *United States v. Bagdasian*, 291 F.2d 163, 164 (1961), *cert. denied*, 368 U.S. 834. *See, United States v. Hopkins*, 739 F.2d 739 (10th Cir. 1982) (donating 85% of the money to charity did not prevent the court from concluding that a violation of the statute had occurred).

CONCLUSION

In sum, you appear to have aired a fraudulent solicitation of funds. Accordingly, WPNT, Inc., licensee of Radio Station KHTK(FM), Florissant, Missouri, has willfully and repeatedly, from April 1, 1991, through April 12, 1991, violated Section 1343 of Title 18 of the United States Code.

Accordingly, pursuant to Section 503(b) of the Communications Act, WPNT, Inc., licensee of Radio Station KHTK(FM) is hereby advised of its apparent liability for a forfeiture of twenty-five hundred dollars ($2,500).

The forfeiture amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) and in our *Memorandum Opinion and Order*, FCC 92-212, released June 4, 1992. In these orders, we established twelve thousand five hundred dollars ($12,500) as the base amount for wire fraud violations. Because the violation was minor, we are reducing the amount to twenty-five hundred dollars ($2,500).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-163

In the Matter of

Amendment of Section 73.202(b), RM-8037
Table of Allotments,
FM Broadcast Stations.
(Clinton, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 21, 1992; Released: August 11, 1992

Comment Date: October 1, 1992
Reply Comment Date: Ocober 16, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Clinton Radio Co. ("petitioner") requesting the substitution of Channel 237C3 for Channel 237A at Clinton, Missouri. Petitioner also requests modification of its license for Station KDKD(FM), Channel 237A, to specify operation on Channel 237C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 237C3 can be allotted to Clinton, Missouri, consistent with the Commission's spacing requirements, at petitioner's specified site 4.4 kilometers (2.7 miles) north of the community.[1] We shall also propose to modify the license for Station KDKD(FM), Channel 237A, to specify operation on Channel 237C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 237C3 for Channel 237A at Clinton, Missouri, since it could provide the community with expanded local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clinton, Missouri	237A, 241C	237C3, 241C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 1, 1992,** and reply comments on or before **October 16, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Timothy K. Brady
P.O. Box 986
Brentwood, Tennessee 37027-0986

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 237C3 at Clinton are 38-24-32 and 93-46-50.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-7

In the Matter of

Amendment of Section 73.202(b), RM-7879
Table of Allotments,
FM Broadcast Stations.
(Scotland Neck and Pinetops,
North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 21, 1992; Released: August 11, 1992

By the Chief, Allocations Branch:

1. At the request of WYAL Radio, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 654 (1992), proposing the substitution of Channel 238C3 for Channel 238A at Scotland Neck, North Carolina, the reallotment of Channel 238C3 to Pinetops, North Carolina, and the modification of Station WWRT(FM)'s construction permit accordingly. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Comments in opposition were filed by Radio Triangle East Company ("Radio Triangle"). Reply comments were filed by the petitioner.[1]

2. Radio Triangle, licensee of Station WSAY-FM, Rocky Mount, North Carolina, contends that the reallotment of Channel 238C3 to Pinetops would not result in a preferential arrangement of allotments. It argues that petitioner's proposal should not be considered as a first local transmission service to Pinetops but as an additional allotment to the Rocky Mount Urbanized Area. Radio Triangle agrees that Pinetops is situated outside the Rocky Mount Urbanized Area. However, it contends that the usable transmitter site area for Channel 238C3 is close to Rocky Mount and thus would provide service to the urbanized area. It also argues that Pinetops is not independent from Rocky Mount. In support, it states that Pinetops does not have its own separate telephone book and that the population of Rocky Mount is far greater than that of Pinetops (48,997 vs. 1,514, respectively).[2] Finally, it states that while Scotland Neck will retain local aural transmission service from daytime-only Station WYAL-AM, the community will be deprived of its only local aural nighttime transmission service, while Rocky Mount currently enjoys local aural transmission service from at least five fulltime aural stations.

3. In response, petitioner avers that Radio Triangle has presented a "completely inaccurate" picture of Pinetops. First, Pinetops is not located within the Rocky Mount Urbanized Area or adjacent thereto. Rather, according to petitioner, Pinetops is located 23.3 kilometers (14.5 miles) southeast of the larger community. Therefore, since neither Scotland Neck nor Pinetops are located within any Urbanized Area, it contends that the proposal should not be considered as a relocation from a rural to an urban community. Second, it submits that the incorporated community of Pinetops is independent from Rocky Mount, having its own local government, police and fire services, businesses, churches, library. Thus, it urges the reallotment of Channel 238C3 to Pinetops as the community's first local aural transmission service.

4. We find that the arguments advanced by Radio Triangle to be unpersuasive. We do not believe that Pinetops should be credited with the services already licensed to Rocky Mount since the community is not located within the Urbanized Area. Pinetops has its own local government, police and fire services, businesses, civic organizations and religious institutions which identify themselves with Pinetops. Other than the population differential between Rocky Mount and Pinetops and the lack of a local telephone directory, Radio Triangle presents no information to dispute that Pinetops is an independent community. We recognize that Scotland Neck will lose its only local nighttime transmission service. However, the Commission has stated that both daytime and fulltime AM stations constitute local aural transmission services for purposes of changes in community.[3] Furthermore, this action will enable Station WWRT(FM) to serve a larger area and population than is now possible. In this regard, we note that neither Channel 238C3 nor any other Class C3 channel can be allotted to Scotland Neck in compliance with the Commission's minimum distance separation requirements. In addition, Scotland Neck will continue to enjoy reception service from one AM and seven FM stations, in addition to Station WWRT(FM), since the community will lie within the 60 dBu contour of a Class C3 Station WWRT(FM). Finally, although Radio Triangle argues that the petitioner seeks the reallotment of its frequency to Pinetops solely to be able to serve Rocky Mount, we find that Station WWRT(FM)'s presently authorized facilities permit service to 90% of Rocky Mount.

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[1] After the record closed in this proceeding, Radio Triangle filed a Motion to Strike petitioner's reply comments to which petitioner responded. The Commission's rules do not contemplate the filing of pleadings beyond the comment and reply comment periods set forth in the *Notice of Proposed Rule Making*. Further, we find that Radio Triangle's Motion to Strike does not provide the Commission with any information of decisional significance. Therefore, we will not consider Radio Triangle's unauthorized pleading.

[2] Radio Triangle cites *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988), which sets forth criteria for determining whether a community within an urbanized area should be considered as a separate community for allotment purposes.

Population figures are taken from the 1990 U.S. Census.

[3] *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990).

5. Accordingly, we believe the public interest would be served by substituting Channel 238C3 for Channel 238A at Scotland Neck and its reallotment to Pinetops, North Carolina, as the community's first local aural transmission service. As proposed, we will also modify petitioner's construction permit for Station WWRT(FM) to specify operation on Channel 238C3 at Pinetops. Channel 238C3 can be allotted to Pinetops in compliance with the Commission's minimum distance separation requirements with a site restriction of 18 kilometers (11.1 miles) north to accommodate petitioner's desired transmitter site and avoid short-spacings to Station WRNS, Channel 236C, Kinston, North Carolina, and Station WKML, Channel 239C, Lumberton, North Carolina.[4]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Pinetops, North Carolina	238C3
Scotland Neck, North Carolina	--

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of WYAL Radio, Inc., for Station WWRT(FM), Scotland Neck, North Carolina, IS MODIFIED to specify operation on Channel 238C3 at Pinetops, North Carolina, in lieu of Channel 238A at Scotland Neck, North Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, WYAL Radio, Inc., permittee of Station WYAL, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] The coordinates for Channel 238C3 at Pinetops are North Latitude 35-55-54 and West Longitude 77-40-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-103

In the Matter of

Amendment of Section 73.202(b), RM-7973
Table of Allotments,
FM Broadcast Stations.
(New London, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 22, 1992; Released: August 11, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 3011 (1992), issued in response to a petition filed by New London Broadcasting ("petitioner"). The *Notice* proposed the allotment of Channel 290C3 to New London, Missouri, as that community's first local service. Petitioner filed comments reaffirming its interest in the allotment of Channel 290C3 at New London, Missouri.

2. We believe the public interest would be served by allotting Channel 290C3 to New London, Missouri, as it will provide the community with its first local service. Channel 290C3 can be allotted to New London, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction 13.5 kilometers (8.4 miles) north of the community.[1] The site restriction will prevent a short-spacing to Station KFXB(FM), Channel 289C, Ste. Genevieve, Missouri, and Station KDAM(FM), Channel 292A, Monroe City, Missouri.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
New London, Missouri	290C3

4. The window period for filing applications will open on **September 25, 1992,** and close on **October 26, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 290C3 at New London are 39-41-44 and 91-20-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-175

In the Matter of

Amendment of Section 73.202(b), RM-7720
Table of Allotments,
FM Broadcast Stations.
(Ravenswood and Williamstown,
West Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 22, 1992; Released: August 11, 1992

By the Chief, Allocations Branch:

1. At the request of MediaCom, Inc. ("petitioner"), licensee of Station WRZZ, Channel 291A, Ravenswood, West Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 3660 (1991), proposing the reallotment of Channel 291A to Williamstown, West Virginia, and the modification of its license to specify Williamstown as its community of license. As requested in the *Notice*, petitioner filed comments in support of the proposal stating its intention to apply for the channel, if allotted. Fritz Communications, Inc. ("Fritz"), and Bennco, Inc. ("Bennco"), filed comments opposing the proposal. Petitioner and Bennco filed reply comments.[1]

2. In its opposition, Bennco, licensee of Station WDMX, Vienna, West Virginia, argues that the petitioner's proposed site coordinates for the reallotment from Ravenswood to Williamstown, West Virginia are 0.6 kilometers (0.4 miles) from Station WDMX's transmitter site. Therefore, Station WRZZ would serve essentially the same areas and populations presently served by Station WDMX and would be in "direct competition with Station WDMX for audience, advertisers and revenues." Bennco states that Ravenswood is a small, rural community of 4,126 persons,[2] 30 miles south of Vienna, West Virginia, and approximately 35 miles south of Williamstown. Williamstown (population 3,095), on the other hand, is across the Ohio River from Marietta, Ohio (population 16,467), and is connected to Marietta by a bridge. Williamstown is five miles northeast of Vienna and approximately 11 miles north of Parkersburg (population 33,842). Bennco purports that the city grade contours of various stations serving the Parkersburg/Marietta area show that the Williamstown allotment, if granted, would provide city grade service to the cities of Marietta, Parkersburg and Vienna. In essence, states Bennco, "the allotment would be for all practical purposes a Marietta/Parkersburg allotment."

3. Bennco argues that petitioner is attempting to move its station from a rural area to a larger, urban area in contravention of Commission policy, citing *Amendment of the Commission Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License MO&O")*, 5 FCC Rcd 7094, 7096 (1990). Bennco states that Ravenswood has only four aural reception services at night, with Station WRZZ providing the only nighttime city grade signal to the community. Stations WXIL-FM and WHCM-FM, Parkersburg, West Virginia, and Station WCEF-FM, Ripley, West Virginia, only partially serve Ravenswood. Therefore, if Station WRZZ relocates, "portions of the community would become a two service area at night and no portion of the city of Ravenswood will receive more than three reception services at night." By contrast, "Williamstown already receives a plethora of existing services." Bennco claims Williamstown receives 100% daytime reception services from eight FM stations and six AM stations for a total of 14 services. At night 100% of the city receives reception service from eight FM stations, and one AM station covers a portion of the city. Bennco concludes that Williamstown, like the remainder of the Marietta/Parkersburg market, is very well-served.

4. Bennco argues that Station WRZZ "shows little or no interest in serving its licensed community of Ravenswood, West Virginia." Bennco claims that its representative visited the station's offices and studios on several occasions and found no one present. Therefore, Bennco argues, petitioner is in violation of Commission Rule 73.1125(a), the main studio rule, because the station is operating from another location. Bennco states that Commission Rule 73.1125(a) requires a licensee to maintain a "meaningful management and staff presence at the location designated as the main studio, by maintaining full-time managerial and full-time staff personnel" at that location, citing *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991). Thus, Bennco concludes that petitioner has moved its facilities out of Ravenswood and, for this reason, the request for reallotment should be denied.

5. In its opposition, Fritz, licensee of WXKX(FM), Parkersburg, West Virginia, argues that petitioner's proposal violates Commission Rule 73.315(b) because rugged terrain obstructs the line-of-sight path to the community of license. Fritz notes petitioner's statement in its petition for rule making that Station WRZZ is unable to serve Ravenswood because of terrain problems. Fritz asserts that the same terrain problems exist with respect to petitioner's proposed transmitter site as both Ravenswood and Williamstown lie near the bank of the Ohio River and at each location the grounds rise in hills from the river valley. Fritz maintains that these hills block the lower-lying cities from receiving a direct line-of-sight signal from the transmitter site. It includes an engineering statement demonstrating that direct line-of-sight signal to Williamstown from petitioner's proposed site would be

[1] The following pleadings were filed after the record closed: Motion to Accept Supplemental Reply filed by Fritz; Motion for Leave to File Additional Comments filed by Bennco; and Opposition to each Motion filed by petitioner. The Commission's Rules do not contemplate the filing of pleadings beyond the comment periods. Therefore, in accordance with Section 1.415(d), they will not be considered herein.

[2] Population figures are taken from the 1980 U.S. Census unless otherwise specified.

blocked by major terrain obstacles. Thus, Fritz argues, petitioner's proposal is in violation of Commission Rule 73.315(b) which directs that the "location of the antenna should be so chosen that line-of-sight can be obtained from the antenna over the principal city... to be served; in no event should there be a major obstruction in this path." To provide Williamstown with a direct lineof-sight signal, the tower at petitioner's proposed site would have to be at least 113 meters, a height that would likely conflict with FAA's airport standards. In addition, Fritz states that petitioner's claim that its proposed transmitter site "readily meets all current FCC 'Community of License' predicted contour coverage requirements" is based only on "prediction of coverage" described in Commission Rule 73.313. By that method, which does not take into account terrain interference, Station WRZZ's present facilities are predicted to provide 70 dBu coverage to Ravenswood. Fritz argues that the former licensee and petitioner both acknowledged terrain problems exist and that the coverage prediction method in Section 73.313 is inaccurate because of terrain problems in Ravenswood. Thus, Fritz argues, petitioner should be not permitted to argue that this method should be used, despite similar terrain problems, to predict service to Williamstown.

6. Fritz states that the public interest would be disserved by the proposal, as removal of Station WRZZ from Ravenswood would deprive the community of its only local evening and nighttime aural transmission service, leaving Ravenswood with a single, part-time AM service operating only during daytime hours. Fritz claims the petitioner is attempting "to reallot a channel from a smaller, underserved and isolated community to a large suburban community which has no local transmission service but which receives numerous signals from the adjacent metropolis," citing to *Community of License MO&O*, 5 FCC Rcd at 7097. Williamstown lies at the center of Parkersburg Marietta, Ohio, a Consolidated Metropolitan Statistical Area of over 150,000 persons. Marietta is served by one local FM and at least eight other stations, and Parkersburg is served by three local FM and at least six stations. Therefore, Fritz argues that removing Ravenswood's only full-time radio station to Williamstown cannot be justified as a "net service benefit" that promotes the public interest.

7. In its reply comments, petitioner argues that Bennco's and Fritz's opposition to Station WRZZ's relocation to Williamstown is based on their fear of "additional and substantial competition" in the area. Petitioner notes that Vienna is in the middle of the Marietta/Parkersburg market, whereas Williamstown is near the northern boundary of the market.

8. Petitioner refutes Bennco's allegation that Station WRZZ has abandoned its presently-licensed community of Ravenswood. Petitioner states that the Commission was notified on February 20, 1991 that the main studio location of Station WRZZ had been changed, and that Bennco's agent must have been visiting the former address. Petitioner notes that it provides public service announcements for local organizations and has participated in local activities. Even if Bennco's allegations were true, petitioner argues the issue would be irrelevant to this proceeding.[3]

9. Petitioner argues that its proposal complies with the guidelines set forth by the Commission in its *Community of License MO&O*. With respect to the issue that the remaining station in Ravenswood is a daytime only AM station, petitioner contends that the Commission has noted that both daytime and full-time AM stations are to be treated as local aural transmission services when evaluating change of community proposals. Additionally, petitioner notes, Station WMOV(AM) has been authorized by the Commission to operate at approximately 20 watts of power at night, and that power would be sufficient to cover a substantial part of Ravenswood. Petitioner submits an engineering statement indicating Ravenswood is completely served by four aural reception services, not including WRZZ or WMOV(AM). Furthermore, petitioner argues that although stations in Parkersburg, Marietta and Vienna provide 1 mV/m service to Williamstown, this reception service does not compensate for the fact that the community is deserving of its first local aural transmission service.

10. Finally, petitioner rebuts Fritz's argument that the reallotment of Station WRZZ to Williamstown will suffer from the same type of terrain obstruction it now has at Ravenswood. Petitioner submits that the "minor optical terrain obstruction" between the proposed site and Williamstown is slight and Williamstown would receive city grade service. In fact, states petitioner, "Williamstown will be provided with a signal level well in excess of the minimum city grade strength." Petitioner asserts that the 113 meters tower necessary to provide the signal would ultimately receive FAA approval. It includes an affidavit from an air space consultant that such a tower would be approved. Thus, if Station WRZZ would relocate at the assumed site, it would provide the requisite city grade signal at the assumed height to provide such coverage. Petitioner contends "there is at least one alternate site from which [Station] WRZZ could operate in full compliance with mileage separation requirements and the city grade signal requirement with no terrain obstruction."

11. Bennco's reply comments reiterate its arguments in opposition to the proposal and supports Fritz's contention that the terrain obstruction petitioner seeks to correct with the reallotment of Station WRZZ from Ravenswood to Williamstown would still exist at the new community. It supports Fritz's argument that the proposed reallotment would be in violation of the Commission's rule regarding transmitter sites.

DISCUSSION

12. As an initial matter, we note that a Commission engineering analysis confirms petitioner's statement that while there would be "optical shadowing"[4] between the proposed transmitter site and Williamstown, a 70 dBu signal could reach the entire community. Petitioner refers to Section 73.314(c)(1)(ii) which dictates the points for field strength measurements and a program which takes into account terrain factors and their effect on signal

[3] Bennco has not submitted sufficient evidence to support its claim that petitioner is in violation of Section 73.1125(a) of the Commission's rules. Therefore, we will not consider this claim herein.

[4] "Optical shadowing" is shadowing which prevents a direct line-of-sight between two points.

propagation. This yields a minimum field strength of 83 dBu. As petitioner notes, a higher tower of approximately 113 meters would eliminate all "shadowing."

13. Bennco argues that Station WRZZ would directly compete with its Station WMDX. However, it is Commission policy that economic impact arguments in opposition to proposed new FM allotments will not be considered. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *aff'd*, 4 FCC Rcd 2276 (1989).

14. With respect to evaluating proposals to change community of license, the Commission has stated, "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting a channel from one community to another." *See Community of License MO&O*, 5 FCC Rcd at 7097 (1990); *see also Report and Order (Eatonton and Sandy Springs, Georgia; Anniston and Lineville, Alabama)*, 6 FCC Rcd 6580 (1991), *app. for rev. pend.* Our engineering analysis indicates that by changing its community of license, Station WRZZ would serve an additional 98,548 persons in Wood, Pleasants and Washington Counties. However, our analysis also indicates that removal of the station from Ravenswood will result in a loss of service to some 37,207 persons in Wood, Wirt, Jackson, Roane and Meigs Counties. Furthermore, the gains in service that would occur would primarily be in areas which currently receive a number of reception services. Each part of the gain area for Williamstown receives a minimum of six services. Three FM stations serve the entire area, while at least 11 stations serve parts of the area, for a total of 14 reception services. On the other hand, the area that would lose Station WRZZ's signal receives fewer signals overall. While fourteen signals provide reception service to different parts of the loss area, some parts of the area would receive service from as few as two signals with the removal of Station WRZZ. Furthermore, Williamstown, with a population of 2,774 persons according to the 1990 United States Census, is located approximately 17.7 kilometers (11 miles) from Parkersburg. On the other hand, Ravenswood has a population of 4,189 persons, and is approximately 39.5 kilometers (24.6 miles) from Parkersburg. We do not believe the public interest would be served by reallotting a full-time service from the relatively isolated community of Ravenswood to a community approximately half its size when the action would cause a loss of reception service to over 37,000 persons. We realize that this proposal would provide Williamstown with its first local aural transmission service, and that Ravenswood would retain a vacant FM channel and an AM station.[5] While our allotment priorities generally favor proposals that would provide a first local transmission service to a community, we are willing to apply the allotment criteria flexibly, where warranted. We believe that flexible application is appropriate in situations that would result in the loss of reception service to an area when, as here, there are minimal countervailing public interest benefits. Therefore, we will deny petitioner's proposal.

15. IT IS ORDERED, That the petition for rule making filed by MediaCom, Inc. requesting the reallotment of Channel 291A from Ravenswood to Williamstown, West Virginia, IS DENIED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] Channel 226A was allotted to Ravenswood in MM Docket No. 92-18, 7 FCC Rcd 3062 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

MIDWEST KAAL CORPORATION CSR-3570
IA0014

Petition for Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1992; Released: August 11, 1992

By the Commission:

1. On May 23, 1991, Midwest KAAL Corporation [KAAL], licensee of Television Broadcast Station KAAL (ABC, Channel 6), Austin, Minnesota, filed the captioned petition for declaratory ruling. As amended on June 6, 1991, KAAL seeks a ruling that it is entitled to receive network program nonduplication protection on the cable television system serving Algona, Iowa, operated by Televents Group Joint Venture d/b/a WestMarc Cable Group, Inc. [WestMarc]. Several parties have filed comments on KAAL's petition, public notice of which was given on June 17, 1991.[1]

INTRODUCTION

2. The Commission's network program nonduplication rules (§§76.92-76.97 of the Commission's Rules) allow local television stations to require that a cable system, upon proper notification, not carry network programs as broadcast by any other station if the local stations hold the nonduplication rights in the relevant market. The order of nonduplication priority, pursuant to §76.92(b) of the Rules, is as follows:

> (1) First, all television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;
>
> (2) Second, all smaller market television broadcast stations within whose secondary zone the community of the community unit is located, in whole or in part.

In other words, any local station may assert its rights in a zone extending 35 miles from the station's community of license, which is a station's specified zone. In smaller markets, a local station may not only assert its rights in its specified zone, but the station may also assert its rights through a secondary zone extending 20 miles beyond the 35-mile specified zone, for a zone of 55 miles in radius surrounding the station's community of license. This is spelled out in a note to this rule which addresses the geographic area of protection:

> With respect to network programming, the geographic zone within which the television station is entitled to enforce network non-duplication protection and priority... shall be that geographic area agreed upon between the network and the television station. In no event shall such rights exceed the area within which the television station may acquire broadcast territorial exclusivity rights as defined in §73.658(m), except that small market television stations shall be entitled to a secondary protection zone of 20 additional miles. To the extent rights are obtained for any hyphenated market named in §76.51 such rights shall not exceed those permitted under §73.658(m) for each named community in that market.

In pertinent part, §73.658(m)(1) of the Rules states that

> [n]o television station shall enter into any contract, arrangement, or understanding, expressed or implied; with a non-network program producer, distributor, or supplier, or other person; which prevents or hinders another television station located in a community over 56.3 kilometers (35 miles) away... from broadcasting any program purchased by the former station... except that a television station may secure exclusivity against a television station licensed to another designated community in a hyphenated market specified in the market listing as contained in §76.51 of this chapter for those 100 markets listed, and for markets not listed in §76.51 of this chapter, the listing as contained in the ARB Television Market Analysis for the most recent year at the time that the exclusivity contract, arrangement or understanding is complete under practices of the industry.

Austin, Minnesota, KAAL's city of license, is part of the Rochester, Minnesota-Mason City, Iowa-Austin, Minnesota smaller television market (#146 by Arbitron ADI [Area of Dominant Influence]). Algona, Iowa, the city served by WestMarc, is located within the secondary zone surrounding the Mason City, Iowa portion of the market. Based upon these facts, KAAL seeks to assert and enforce nonduplication rights on WestMarc's cable system, against Station WOI-TV (ABC, Channel 5), Ames, Iowa.[2] The primary issue presented, therefore, is whether the zone of protection for a smaller market licensee in a hyphenated market extends through a 55-mile zone surrounding each designated community of the market, or is limited to the smaller market station's 35-mile specified zone.

[1] KAAL initially also sought an expedited pleading schedule and waiver of the 60-day notice requirement of §76.94(c) of the Rules. KAAL subsequently withdrew this request.

[2] WOI-TV's city of license is part of the Des Moines-Ames, Iowa major television market.

SUMMARY OF PLEADINGS

3. In support of its petition, KAAL states that Algona is within the station's ADI, and that the station competes for local advertising dollars with WestMarc, which has stated its intention to cease carriage of KAAL. Citing the rule sections noted above, KAAL argues that it is entitled to nonduplication protection throughout its hyphenated market, including -- as a smaller hyphenated market -- each market portion's secondary zone. Nothing in the *Memorandum Opinion and Order in Gen. Docket No. 87-24*, 4 FCC Rcd 2711 (1989), *clarifying on recon.*, 3 FCC Rcd 5299 (1988), which adopted the current nonduplication rules, contends KAAL, nor anything in the rules themselves contradicts this. Indeed, asserts KAAL, insofar as the Commission recognized the nonduplication rights of major market stations throughout hyphenated markets in *Gen. Docket No. 87-24, supra*, it must do the same for smaller market stations. KAAL maintains that it has been long-standing Commission policy to favor smaller market licensees in this area, as demonstrated by the additional secondary zone of protection afforded such licensees. Accordingly, the Commission would have to take specific action to retreat from this policy if it were to fail to afford smaller licensees protection throughout their hyphenated markets. The note to §76.92 of the Rules applies specifically to major markets, states KAAL, not to smaller markets. Nowhere has the Commission stated an intent to modify its recognition of secondary zones of protection for smaller markets, argues KAAL, and thus, read together, §§73.658(m)(1) and 76.92 of the Rules recognize KAAL's nonduplication rights in Algona. Moreover, not only is Algona within KAAL's ADI, notes the station, KAAL is also significantly viewed in Algona. Smaller market stations are particularly affected by declining advertising revenues and related reductions in network compensation, notes KAAL, underscoring the continuing need for recognition of their rights throughout their markets' secondary zones. This is not a case, KAAL urges, of a station seeking rights beyond its local market, but rather one of a station seeking to enforce its rights within its local market.

4. KAAL's petition is supported by the National Association of Broadcasters [NAB]; TV 14, Inc.; The 97 Television Stations [the Stations], an informal association of primarily smaller market stations; and Station WJFW-TV (NBC, Channel 12), Rhinelander, Wisconsin. NAB and the Stations support KAAL's reading of the nonduplication rules and *Gen. Docket No. 87-24, supra*, as well as KAAL's analysis of smaller market stations' economic status. NAB states in particular that "[i]n 1988 there were an average of 80 television households per square mile in the top 100 ADIs while in ADIs 101 to 212 the average number of television households was only 23 per square mile." The Stations also note that both Arbitron and Nielsen have considered Algona to be part of KAAL's ADI and Designated Market Area [DMA], respectively, since the companies' measuring began. The Stations also caution against permitting cable companies unilaterally to disrupt long-standing local television service, valid network contracts, and established markets. TV 14 urges that hyphenated smaller markets be treated throughout their secondary zones equally with hyphenated major markets.

5. In opposition to KAAL, WestMarc, supported by Paul Glist, Esq. (an individual commenter), and the National Cable Television Association, Inc. [NCTA], argue that Algona, Iowa is approximately 74 miles from Austin, Minnesota, well beyond KAAL's Austin 55-mile zone of protection. WestMarc contends that the rules limit market-wide nonduplication protection in hyphenated markets to those major markets specified in §76.51 of the Rules. Even if protection on hyphenated markets includes smaller markets, WestMarc further contends that this could only be for core 35-mile zones. Nonduplication protection in hyphenated smaller markets thus could not extend into hyphenated secondary zones, and hence Algona, which is located within the secondary zone of the Mason City, Iowa portion of the Rochester, Minnesota-Mason City, Iowa-Austin, Minnesota market cannot be subject to a nonduplication request from KAAL. Were KAAL and similarly situated smaller market licensees so able to extend the reach of their nonduplication rights, argues WestMarc, this would result in smaller market stations receiving protection in communities over 100 miles distant, in some cases into the heart of major television markets.[3] That the Commission stated its "intention... to harmonize the geographic limits of [syndicated exclusivity protection] with those of our territorial exclusivity rules," *Gen. Docket No. 87-24*, 4 FCC Rcd at 2729, does not justify KAAL's request, maintains WestMarc, because no secondary zone of protection exists for syndicated exclusivity protection in smaller markets. KAAL has demonstrated no specific economic harm to justify a waiver of the rules, states WestMarc, and, lacking carriage rights on WestMarc's system, KAAL cannot be permitted to force carriage or nonduplication rights in this manner. NCTA notes that it is not the Commission's role to guarantee stations' economic success, and further expresses its concern over the changeable nature of Arbitron ADI and Nielsen DMA designations, as compared with the Commission's stable list of major markets in §76.51 of the Rules. Mr. Glist maintains that KAAL has no reasonable expectation of exclusivity in Algona, noting that the station's predicted Grade B contour does not extend to Algona.[4]

DISCUSSION

6. Originally, in adopting rules providing additional 20-mile zones of network program nonduplication protection for smaller market stations, we stated that

> a larger zone of protection [is] warranted in order to compensate for the differences in population density patterns which exist outside large urban areas. Therefore, an additional 20 mile zone of protection

[3] NCTA, however, does suggest that if smaller market stations are afforded nonduplication protection throughout their hyphenated markets, it should be conditioned on a showing of off-air receivability in the community. NCTA's suggestion has already been considered and rejected by the Commission. *See Gen. Docket No. 87-24*, 4 FCC Rcd at 2729.

[4] Neither KAAL nor WOI-TV place a predicted Grade B contour over Algona. Each signal, however, is obtained directly off-air by WestMarc at its headend. KAAL is significantly viewed in Algona, while WOI-TV is not.

[is] provided for stations located in smaller markets. This additional zone should adequately protect the audience base of such stations.

Memorandum Opinion and Order in Docket Nos. 19995 and 18785, 56 FCC 2d 210, 215 (1975). Nothing in *Gen. Docket No. 87-24, supra*, has altered this underlying reason for affording smaller market licensees greater areas of nonduplication protection than those afforded major market licensees. In fact, in adopting our current nonduplication rules, we noted our continued concern over loss of audience by local affiliates, as it impacts upon the value of network programming. *Gen. Docket No. 87-24*, 3 FCC Rcd at 5319.[5] Accordingly, we believe that it would be incongruent with our recognition of the needs of smaller television markets not to treat hyphenated smaller markets on a par with hyphenated major markets. We disagree with opponents' contention that the language in the note to §76.92 of the Rules, addressing the extent of nonduplication protection in hyphenated major markets, acts as a bar to recognizing nonduplication protection in hyphenated smaller markets. Indeed, §73.658(m)(1) of the Rules specifically recognizes nonduplication rights in hyphenated smaller markets. Consequently, that §76.92 of the Rules limits rights in major markets does not preclude recognizing rights in smaller markets.

7. With regard to other objections raised to KAAL's requested ruling, we note that hyphenated smaller markets, even including such markets' 20-mile secondary zones, are not necessarily any more geographically extensive than many hyphenated major markets. With regard to Mr. Glist's and NCTA's concerns that KAAL and other stations be receivable in the communities in which protection is sought, we note that KAAL is available off-air in Algona. *See* note 4, *supra*. This is, in any event, not a general requirement of our nonduplication rules. We agree with NCTA that it is not the Commission's role to save marketplace competitors from failure, and WestMarc is correct in noting that KAAL has not submitted specific evidence of economic harm. However, KAAL is seeking a ruling interpreting our rules, not a waiver peculiar to the economic condition of the station itself. Smaller market designations may vary, as NCTA notes, but our designation of major markets are subject to amendment or waiver in their application. This is not a reason to differentiate among markets in applying our nonduplication rules. That KAAL lacks carriage rights on WestMarc's system is also irrelevant, for no station enjoys carriage rights on any system, and our nonduplication rules are not linked to carriage of the station holding nonduplication rights.

8. In view of the foregoing, we find that grant of KAAL's requested ruling is in the public interest.

9. Accordingly, IT IS ORDERED, That the petition for declaratory ruling (CSR-3570), filed May 23, 1991, by Midwest KAAL Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[5] We also recognized Congress' continuing concern that "[f]ree local over-the-air television stations continue to play an important role in providing the American people information and entertainment," H. R. Rep. No. 887, Part 2,100th Cong., 2d Sess. 26 (1988). *Gen. Docket No. 87-24*, 4 FCC Rcd at 2735 n.86.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUBLIC SERVICE COMMISSION OF
THE DISTRICT OF COLUMBIA,
Complainant,

v. File No. E-91-108

THE CHESAPEAKE AND
POTOMAC TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: August 4, 1992; Released: August 11, 1992

By the Deputy Chief (Operations), Enforcement Division, Common Carrier Bureau:

1. On July 8, 1991, the Public Service Commission of the District of Columbia (hereinafter "PSC") filed the above-captioned formal complaint against The Chesapeake and Potomac Telephone Company (hereinafter "C&P") alleging, among other things, that C&P had overcharged its subscribers in the District of Columbia as to a portion of subscriber line charges which had been paid to C&P in the period commencing July 1, 1991. On July 21, 1992, however, PSC and C&P filed a joint motion to dismiss the complaint with prejudice stating that the parties had resolved all disputes with respect to the matters encompassed in the complaint.

2. We are satisfied that withdrawal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delagated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 4, 1992

Released: August 11, 1992

Radio Station WBHL 8310-HTS
Tri-State Inspirational C3-961
Broadcasting Corporation
3625 Helton Drive
P.O. Box IBC
Florence, Alabama 35630

Dear Licensee:

This is a Notice of Apparent Liability for a forfeiture of five thousand dollars ($5,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On January 16, 1992, the Commission sent you a letter of inquiry concerning a complaint we had received that alleged WBHL-FM had broadcast advertisements, in violation of Section 399B of the Communications Act of 1934, as amended, and related rules and policies governing donor and underwriting announcements. In the letter, we identified 10 announcements that we believed violated the rule and that allegedly aired on March 20, and March 21, 1991.

On February 5, 1992, we received your Response to the allegations. You admit that you aired these 10 announcements on March 20, and March 21, 1991. You contend, however, that the terms used in the announcements were identifying traits of the goods and services and that, therefore, the announcements did not violate Section 399B. Additionally, you contend that you have been diligent and conscientious in your efforts to comply with Commission rules and policies regarding underwriting announcements.

Section 399B of the Communications Act prohibits noncommercial stations from broadcasting announcements that promote the sale of goods and services of for-profit entities in exchange for remuneration. Although contributors of funds may receive on-air acknowledgements, such acknowledgments may be made "for identification purposes only and should not promote the contributor's products, services or company." Accordingly, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. *See Public Notice*, 7 FCC Rcd 827 (adopted April 11, 1986). Information to *identify* the donor or underwriter, however, is allowed, including address and phone number.

The announcements in question contain descriptions including: efficient, economical, dependable, dedicated, prompt, fair price, reliable, and excellent. (Transcript attached.) These descriptions are comparative or qualitative, and otherwise exceed the identification-only purpose of underwriting acknowledgments by generally promoting the sale of goods and/or services of forprofit entities. Thus, it appears that you have repeatedly violated Section 399B of the Communications Act of 1934, as amended, and Section 73.503(d) of the Commission's Rules by broadcasting said advertisements.

Accordingly, you are hearby advised of your apparent liability for a forfeiture of five thousand ($5,000) for your apparent repeated violations of Section 399B of Communications Act, in the manner specified above, on March 20, 1991, and March 21, 1991.

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) on Reconsideration, *Memorandum Opinion and Order*, FCC 92-212, released June 4, 1992. Under these standards, twenty-five hundred dollars ($2,500) is the base forfeiture for a violation of underwriting and related limitations on noncommercial broadcasts. We are increasing the forfeiture because the violation was repeated. Therefore, we find that a forfeiture in the amount of five thousand dollars ($5,000) is appropriate for airing the advertisements.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

TRANSCRIPT

The following ABC newscast is being funded by the Florence Gas Department. The Florence Gas Department features natural gas heating systems, an efficient heating source. The Florence Gas Department is community minded and a proud sponsor of Morris Hill Panther Basketball. For an economical heating system, it's natural gas from the Florence Gas Department.

M & J Sporting Goods. Your source for dependable sporting equipment and clothing. Features professional printing for team uniforms, coaches shirts and pants and team logos. M & J's is committed and dedicated to the sports minded person. M & J sporting goods, a sponsor of Morris Hill Basketball. M & J located at the intersection of Cloverdale and Stonypoint Road, Petersville.

Tom Smith Lawn and Tire company, 320 Northwood Avenue in Florence has a full line of John Deer mowers ranging from walk-behinds to riding mowers all the way up to utility tractors. John Deer mowers have a smooth even cut over just about any terrain and are built to give season after season of service. Located at 320 Northwood Avenue in Florence across from the Florence City Park. Tom Smith's Lawn and Tire is there to help. Their phone number is 764-1741.

Country Gas Office conveying economical and comfortable ways to heat homes and businesses. Whether it's for heat during the winter or to have the luxury of beautiful gas logs or just to forget the charcoal mess of outdoor cooking grills, its Country Gas with nine offices located throughout Central and North Alabama.

PSI. Located in downtown Florence is as interested in keeping your office running smoothly as you are. A whole new generation of technology is changing the way you think about the office and how you generate, transmit, and store business information. A good old fashioned service should never change. PSI features professional solutions to your business problems backed by prompt, reliable service. Printers Stationers Incorporated, downtown Florence. The phone number is 764-8061.

James Dobson family commentary. Nelda Stephenson Chevrolet Geo and Nelda Stephenson Mitsubishi. Florence Boulevard, Florence. We feature new and used cars and excellent service.

The Print Shop Florence features fast, courteous service, trust and a reliable product at a fair price. Jack Powell has twenty years layout experience. Services offered by the print shop include quick copy service, computer type settings continuous forms, custom design logos, form design stock forms, business cards, bindery, wedding invitations, fax service, and business forms management. The print shop located at 103 Simpson Street, Florence.

Preferred Risk Mutual Insurance Agent Gayle Fowler has insurance packages ranging from insuring church buildings to life insurance. Preferred Risk Mutual is America's nondrivers insurance company. Preferred Risk Mutual. Gayle Fowler and the Shoals, a winning combination. Gayle Fowler for Preferred Risk Mutual, located at 119 Helton Court in Florence. The phone number is 766-7288.

Harrison Pontiac, Florence Boulevard in Florence builds excitement. From compacts to full size cars to mini-vans; from safety to fuel economy to customer satisfaction. And Grand Am is one of them. At Harrison Pontiac, you'll find the full line of exciting new Pontiacs and a good selection of previously owned vehicles. Located at 1250 Florence Boulevard in Florence.

El Torro Mexican Restaurant features authentic Mexican Food. Prepared fresh daily with an impressive variety of tasty main and side dishes for lunch and dinner. El Torro Mexican Restaurant serving the Scholls area twenty-one years. Located on Jackson Highway, Sheffield and in Parkway Shopping Center, Florence. Ole'!

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-218

In re Applications of	
ISIS BROADCAST GROUP	File No. BPH-880301MG
JOELMART, INC.	File No. BPH-880301MJ
GRAZIANO BROADCASTING COMPANY	File No. BPH-880301NA
PATRICIA WHEELER WODLINGER	File No. BPH-880301ND
CHANEL BROADCASTING	File No. BPH-880301NH
P & T COMMUNICATIONS, INC.	File No. BPH-880301NO
SANTA BARBARA COMMUNICATIONS, INC.	File No. BPH-880301NR
DEBORAH LYNN SCZUDLO	File No. BPH-880301OA
YING HUA BENNS	File No. BPH-880301OE
DELTA BROADCASTING, INC.	File No. BPH-880301OL

For Construction Permit for
New FM Station on Channel 299B1,
Santa Barbara, California

Appearances

Lewis J. Paper on behalf of Isis Broadcast Group; *Dennis P. Corbett* and *Evan D. Carb* on behalf of Joelmart, Inc.; *Robert L. Hoegle* and *Timothy J. Fitzgibbon* on behalf of Graziano Broadcasting Company; *James A. Koerner* on behalf of Patricia Wheeler Wodlinger; *Stephen Diaz Gavin* on behalf of Chanel Broadcasting; *Harry C. Martin* and *Andrew S. Kersting* on behalf of P & T Communications, Inc.; *William H. Crispin* and *Dean R. Brenner* on behalf of Deborah Lynn Sczudlo; *Sidney White Rhyne* on behalf of Ying Hua Benns; and *Peter A. Casciato* on behalf of Delta Broadcasting, Inc.

DECISION

Adopted: July 27, 1992; Released: August 13, 1992

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Edward J. Kuhlmann (ALJ), 7 FCC Rcd 599 (1992), which granted the construction permit application of Joelmart, Inc., for a new FM station in Santa Barbara, California, and denied the competing applications of the other nine applicants remaining in this proceeding. All but Santa Barbara Communications, Inc., excepted to the *Initial Decision*,[1] and Joelmart filed contingent exceptions and a brief supporting the *Initial Decision*. Six of the parties filed replies.[2]

2. The *Hearing Designation Order*, 5 FCC Rcd 3165 (M. Med. Bur. 1990), in this proceeding designated an air hazard issue against P & T and financial and related misrepresentation issues against Chanel and Sczudlo. The ALJ determined that P & T's tower at its amended site would not constitute a hazard to air navigation and found P & T to be qualified technically.[3] *See Initial Decision* at 599-600 ¶ 3, 614 ¶ 145. He resolved the financial and misrepresentation issues against both Chanel and Sczudlo, finding that each is unqualified and neither had acted in good faith when certifying to financial qualifications. *Initial Decision* at 614-615 ¶¶ 146-156. Chanel and Sczudlo take exception to the ALJ's factual analysis and the conclusions he drew.

3. The *Hearing Designation Order* also included the "standard comparative" issue for all the applicants. This is governed primarily by the guidelines set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*). After hearing the evidence, the ALJ concluded that Joelmart is preferred overall. He found that, of the three applicants with approximately comparable quantitative integration--Joelmart, Benns, and Graziano Broadcasting, Benns had slightly greater qualitative strength overall than Joelmart, but this did not outweigh the demerit under the diversification factor that attached to her ownership of broadcast stations in other communities. Joelmart, which has no other media interests, had a stronger integration proposal than Graziano Broadcasting and, therefore, was the preferred applicant. Isis and Delta were denied any integration credit by the ALJ and have challenged this conclusion. Each of the parties has asserted its strengths and most have pointed to

[1] The application of Santa Barbara Communications, Inc., was denied because the applicant did not have an antenna site acceptable to the Federal Aviation Administration. *Initial Decision*, 7 FCC 2d at 615 ¶ 156. The applicant did not file exceptions to this denial; therefore, its application will be dismissed for failure to prosecute.

[2] Replies were filed by: Isis Broadcasting Group; Joelmart, Inc.; Graziano Broadcasting Company; Chanel Broadcasting; Ying Hua Benns; and Delta Broadcasting, Inc. Patricia Wheeler Wodlinger, P & T Communications, Inc., and Deborah Lynn Sczudlo did not file replies.

[3] This determination has been challenged with the argument that P & T should not have been found qualified because it did not seek summary decision or make an affirmative case on this point after filing a curative amendment to its application. In light of the outcome here, we need not reach this issue.

their competitors' real or perceived weaknesses. Each claims entitlement to the permit as the best qualified applicant.

4. Upon review of the pleadings and record before us, we are affirming the ALJ's conclusion that neither Chanel nor Sczudlo has demonstrated its financial qualifications to construct the station and operate it for three months without revenues. Thus, neither is entitled to comparative consideration. With regard to the comparative analysis, we are constrained to agree with Delta that its integration proposal should be fully credited under Commission precedent and, once credited, that it is the preferred applicant under the Commission's comparative criteria. For this reason, we are reversing the ALJ's grant below and granting the application of Delta Broadcasting, Inc.

CHANEL BROADCASTING

5. Chanel Broadcasting is a general partnership owned by Cynthia Carter (51 %) and Laura Simpson (49 %). When it filed its application in March 1988 it certified that it was not financially qualified.[4] It amended its application in June 1988 to certify to its financial qualifications on the basis of an April 12, 1988, letter from Texas Commerce Bank in Arlington (TCB).[5] The decisional issue is whether Chanel was financially qualified when it certified to its qualifications. The ALJ found against Chanel on this issue, and also found that Chanel had not certified to its qualifications in good faith. Chanel has excepted. After reviewing Chanel' exceptions, Joelmart's reply, and the relevant exhibits and testimony, the Board is affirming the ALJ's conclusion that Chanel is not financially qualified.

6. To demonstrate its financial qualifications if it does not have sufficient net liquid assets on hand, an applicant must prove that, at the time it certified to its qualifications, it had reasonable assurance of sufficient committed funding to construct the proposed station and operate it for three months without revenues. *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 ¶ 15 (1989), *recon. denied*, 5 FCC Rcd 3075 (1990), *aff'd*, No. 90-1291 (D.C. Cir. July 12, 1991). When the funding is expected to come from a lending institution, the Board looks at several factors:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

Scioto Broadcasters, 5 FCC Rcd 5158, 5160 ¶ 12 (1990), *rev. denied*, 6 FCC Rcd 1893 (1991), *recon . dismissed*, 6 FCC Rcd 4626 (1991).

7. The ALJ's findings clearly show that Chanel did not have a sufficient dialogue with TCB to satisfy the *Scioto* showing. *See Peter Joseph Devlin*, 7 FCC Rcd 2499 (Rev. Bd. 1992). The bank had no information about Chanel or its partners other than the amount of loan sought, and no one discussed the terms of a loan with the bank. *Initial Decision* at 600-01 ¶¶ 9-10, 614 ¶ 147. The initial contact was made by Cynthia Carter's brother, Dr. Richard Carter, at Ms. Carter's request. *Id.* at 600 ¶ 5. Dr. Carter spoke once by telephone with Keith Forrester, his TCB account representative in the professional banking division,[6] and sent Forrester a one or two-page summary of the Commission's financial requirements and a sample bank letter. *Id.*; Tr. 1648, 1656.[7] Ms. Carter claims to have spoken with Forrester several times, but from her testimony about these calls, it is clear that nothing substantive was discussed.[8] David A. Jackson, TCB Executive Vice President, Commercial Group, and Forrester's superior, testified the bank still had a long way to go before deciding to loan Chanel money, and he enumerated what information the bank would need. *Initial Decision* at 601 ¶ 11; Tr. 1625-26.

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[4] This application was filed before the Commission changed its interpretation of 47 C.F.R. § 73.3564 to provide that an application for a new station in the nonreserved FM band would be returned as nontenderable for filing if it bore a negative financial certification. *See Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853, 3859 and n. 71 (1989); *R. J. Winter, Inc.*, 7 FCC Rcd 2235, 2236 ¶ 7 (1992). No applicant has questioned the timeliness of Chanel's June 1988 amendment in this case.

[5] The bank had issued a letter on March 31, 1988, that Chanel's counsel did not think met the Commission's reasonable assurance standard. His follow-up with the bank led to the April 12 letter.

[6] The professional banking division "primarily caters to high net worth individuals such as doctors, lawyers, people of that kind." Tr. 1658.

[7] Ms. Carter claims she sent her brother a copy of her application. Tr. 885. Her brother testified he received only the summary of the Commission's financial requirements, not the application. Tr. 1648.

[8] Chanel emphasizes these calls in its exceptions. Ms. Carter claims to have spoken with Forrester before he signed the March 31, 1988, letter and again before he and David A. Jackson signed the April 12, 1988, letter. Forrester did not recall the calls but did not deny that they took place. Tr. 1662. According to Ms. Carter, the first calls were about the status of a letter and the last dealt generally with the need to revise the letter. Tr. 882-83, 885-87, 897, the details of which Chanel's attorney then discussed with Forrester. Tr. 888-98, 1666. As the ALJ noted, Forrester did not ask Ms. Carter for any information, and she had not given either her brother or Forrester any financial information. *Initial Decision* at 600 ¶ 10; *see* Ms. Carter's testimony at Tr. 886, 888, 889. She did not speak with Jackson. Tr. 901-02.

8. Ordinarily this undenied lack of any substantive contact between the bank and the applicant would be dispositive of the financial qualifications issue. However, Chanel argues that such contact was not necessary here because the bank was relying on Ms. Carter's brother as guarantor. According to Chanel, Dr. Carter had indicated his willingness to guarantee the loan during his preliminary--and only--conversation with Forrester about Chanel's application, and the bank had all the information it needed about him. The problem with this argument is that there is no showing of a common understanding among all the purported parties to this arrangement. *See Initial Decision* at 601 ¶¶ 12-14. David Jackson, a signatory to the April 12, 1988, letter and the person whose testimony Chanel considers most persuasive, testified he wasn't sure at the time how Dr. Carter would be involved with the loan "because there were other credit criteria that had to be met and examined." Tr. 1606. Dr. Carter could have been a co-maker or guarantor of the loan, or he could have borrowed the money and then loaned it to his sister and her partner. *Id.* Jackson further testified that, when he discussed the April 12 letter with Forrester, his "conversations with him centered on the fact that he needed to have the conversation with Dr. Carter with his understanding that he would be obligated in some fashion." Tr. 1606. What exactly was explained to Dr. Carter, however, he did not know. Tr. 1606.[9] Forrester's only conversation with Dr. Carter, Tr. 1648--when Dr. Carter called to see if something could be done for his sister--occurred before Forrester had any chance to discuss the matter with Jackson. According to Dr. Carter, he assumed that he might have to cosign the note for his sister, but Forrester "didn't say specifically that he would require me to do that I remember, but I'm sure that my understanding was that I would have to co-sign the note, that was my understanding from my conversation with him." Tr. 1637. He further said he told Forrester he would cosign the note, which he understood to mean he would be "liable for the value of that note if the person defaults on the note." Tr. 1638.[10] But, he had not seen a copy of Chanel's application, Tr. 1648, and knew nothing of Chanel's financial status or business plan, Tr. 1649, 1652, or for that matter how much of Chanel his sister owned. Tr. 1647. He also did not know Laura Simpson, his sister's partner, at that time. Tr. 1647. Forrester testified that he did not recall discussing Dr. Carter's willingness personally to guarantee a loan. Tr. 1659, 1661-62.

9. Likewise, nothing in the record suggests that Chanel's principals talked with each other about relying on Dr. Carter or discussed such reliance with Dr. Carter before Chanel certified to its financial qualifications in 1988. As the ALJ found, Ms. Simpson thinks she and Cynthia Carter discussed Dr. Carter's role as guarantor in October 1990. *Initial Decision* at 601 ¶¶ 13-14. Cynthia Carter doesn't recall talking with her brother about guaranteeing the loan until Christmas of 1990. Dr. Carter doesn't recall talking with his sister about it at the time of the 1988 bank letters or during the 1990 Christmas season or at all. Tr. 1649-50. He didn't talk about it when he first met Ms. Simpson in October 1990. Tr. 1653-54. The bank letter mentions a line of credit for Ms. Carter and Ms. Simpson, but it does not mention any requirement for a guarantor or co-signer. *See* Chanel Ex. 12, pp. 2-3. Dr. Carter's discussion with Jackson in February 1991 about guaranteeing the loan and his testimony in July 1991 about his willingness to co-sign a note for Chanel, Tr. 1631, 1641-42, do not establish that, when Chanel certified to its qualifications in 1988, Dr. Carter's willingness was clearly stated, was understood and relied on by all the parties to the transaction, and obviated the need for the bank to see any information about Chanel or its principals before making even a preliminary evaluation.[11] Although the Commission has accepted oral understandings when evaluating an applicant's reasonable assurance, it does not do so without probative evidence of the agreement, such as uncontroverted affidavits or testimony. *See Port Huron Family Radio, Inc.*, 5 FCC Rcd 4562, 4562 ¶ 2 (1990); *Northampton Media Associates*, 4 FCC Rcd at 5519 ¶ 16. The conflicting evidence here of Dr. Carter's alleged guarantee falls far short of this standard.

10. In spite of the deficiencies concerning Chanel's bank letter, Chanel insists the letter is more than the accommodation found by the ALJ, because the terms are clear. The April 12 letter simply says that Ms. Carter and Ms. Simpson would have to meet the bank's credit criteria, request and receive a formal lending commitment, and execute required documents. Interest would be at some rate above prime, and repayment would be over 60 months or some other time. Chanel Ex. 12, p. 2. The letter did not mention collateral or indicate that the bank had made even a preliminary review of Chanel's qualifications or its principals' qualifications, because, as noted above, the bank had no information about Chanel or its principals.

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[9] Jackson later testified that, although he insisted that there be a conversation with Dr. and Ms. Carter, that conversation did not occur until "Somewhere around February the 7th, a few days later of 1991." Tr. 1618. This was long after the April 12, 1988, letter was signed and filed with the Commission, but before the bank's third letter, on February 19, 1991, which conditioned any loan on Dr. Carter's guarantee. *See* Chanel Ex. 12, p. 4.

[10] When asked for his understanding of the term "guarantee," he said at Tr. 1642:

> Guarantee would probably mean and I think they probably are synonymous terms but I like the word co-sign because that makes the first party is pretty much their neck is on the line for the note and only if they default would I be on the note. And guarantee means it would be more of an equal sort of thing. I think co-sign is a better word.

[11] Chanel argues that the Board should not second-guess a lender's reliance on the assets of a relative or second-guess the prudence of a bank's lending practices. But, neither point is germane here. Unlike *A. P. Walter, Jr.*, 6 FCC Rcd 875, 878 ¶ 16 (Rev. Bd. 1991), on which Chanel relies for its point about relatives, Chanel is not relying on the funds of a spouse who voluntarily assented to referral of his personal assets to the bank for loan commitment purposes. Chanel is belatedly relying on the personal guarantee of one principal's brother in a distant city, which, as noted above, was not timely sought or given. Neither the ALJ below nor the Board here is turning the decision on any views about the prudence of relying on a guarantee from Dr. Carter.

11. But, our analysis of the April 12 letter is not limited to its provisions, which, when parsed, offer no insight into the bank's view of Chanel's qualifications or the qualifications of its principals for a loan of $400,000. Forrester testified that, based on his single telephone conversation with Dr. Carter, the letter he signed on March 31 was intended merely as an accommodation to Dr. Carter. Tr. 1660-61. When asked whether Dr. Carter had said anything about the bank's chances of actually making the loan to Chanel, Forrester said:

> He mentioned that it was very unlikely that we would be involved because of the geographic location and that this was primarily a way to aid his sister in getting some documentation quickly and that we would unlikely be involved in any type of transaction.

Tr. 1660. When asked whether it was unusual for the bank to issue a letter like the March 31 letter, he said:

> This gives the impression of a commitment letter unless you really read through it. We normally issue commitment letters after a deal has been approved or did, at least, after it had been recommended and approved by the loan committee of the bank. This was more I guess I would term it as a letter of intent to look at a deal and review it.

Tr. 1661. With respect to the April 12 letter, he said that minor changes had been made at the request of Chanel's counsel but that there was no substantive difference between the two letters. Tr. 1666.[12] The letters essentially followed the draft Chanel had provided. Tr. 1664. When Forrester and Jackson signed the April 12 letter, the bank still did not have any information about Chanel or its principals.

12. Chanel would have the Board disregard Forrester's testimony as unreliable and inconsistent with other testimony. Forrester's testimony is unreliable in Chanel's view because Forrester is no longer connected with banking and has had the distraction of personal business problems during the intervening years, but one could as easily view his disinterest in the outcome here as enhancing his reliability, and his memory generally was not shown to be impaired. Chanel finds inconsistency because both Forrester and Jackson testified about the bank's willingness to do the deal subject to the terms and conditions of the April 12 letter. *See* Tr. 1610, 1675. But, this argument is to no avail where the terms and conditions are that the applicant must first present information to the bank and be evaluated and approved before a decision is made. Jackson testified that the April 12 letter was meant to say that the bank would be willing to look at Chanel's qualifications at such time as they were brought to the bank's attention. Tr. 1628. Thus, Forrester's testimony is not inconsistent with his own or Jackson's testimony. Without any information about the applicant, the bank was in no position to offer even a preliminary evaluation of Chanel's creditworthiness.[13] Chanel also challenges Forrester's characterization of the letters as an accommodation, a characterization that the ALJ relied on in making his own adverse findings about the letters. While Forrester did not say the term was used during his conversation with Dr. Carter, *see* Tr. 1660, it is his characterization of the thrust of his conversation with Dr. Carter and the intent behind both the March 31 letter he signed and the substantially similar April 12 letter he prepared for his and Jackson's signatures. The ALJ did not err in making findings based on Forrester's understanding of what he was being asked to do and his intention when complying.

13. In sum, based upon the record evidence, we find that Chanel was not financially qualified to construct and operate the proposed station at the time it affirmatively certified to its financial qualifications. It relied only on a bank letter inviting it to apply, which was issued to the applicant without any information from the applicant or any mention of what collateral might be required, and an alleged oral "guarantee" from a relative of one of the applicant's principals to the bank, a "guarantee" that was not even discussed by the applicant and the relative or by the applicant and the bank until years after Chanel certified to its qualifications. This reliance was misplaced.

14. Chanel also excepts to the ALJ's conclusion following from this--that Chanel's "representations about its financial qualifications have not been made in good faith." *Initial Decision* at 614 ¶ 148. Because this conclusion has overtones of misrepresentation, a potentially disqualifying character defect under *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210-11 (1986) (subsequent history omitted), Chanel argues that the ALJ did not make findings about the applicant's intent to deceive or its principals' demeanor or credibility as witnesses. Having found that the evidence of record overwhelmingly demonstrates that Chanel has not met the objective standard of "reasonable assurance" of a bank loan, the Board need not reach the more subjective question of Chanel's good faith. *See Janice Fay Surber*, 5 FCC Rcd 6155, 6159 ¶ 27 (Rev. Bd. 1990); *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7947 ¶ 10 (Rev.

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[12] The March 31 letter provided that:

> This credit is subject to and contingent upon approval by the Loan and Discount Committee of the Bank, and the Bank will not be obilgated [sic] to extend the credit unless that approval is obtained.

Joelmart Ex. 17, page 2. This provision was not included in the April 12 letter. *Compare* Chanel Ex. 12, page 3.

[13] Although Chanel argues that the bank does not need information until Chanel seeks a formal lending commitment, the precedent is clear that the borrower's qualifications must be preliminarily reviewed even though the applicant does not need a binding written agreement from the lending institution. *See, e.g., Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6322 ¶ 36 (1990). The "present firm intention to make a loan, future conditions permitting" standard of *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980), cannot be established if the bank has not even reviewed the borrower's qualifications. The same standard applies to the promise of someone, even a sibling, to guarantee a loan. The applicant should make information about its financial plan and circumstances available to the alleged guarantor of its indebtedness upon whose guarantee it depends for its financing.

Bd. 1989), *recon. denied*, 5 FCC Rcd 322 (Rev. Bd.), *review denied*, 5 FCC Rcd 5751, *recon. dismissed*, 5 FCC Rcd 7446 (1990), *aff'd*, No. 90-1505 (D.C. Cir. January 7, 1992).

DEBORAH LYNN SCZUDLO

15. Deborah Lynn Sczudlo, an individual applicant, relied on a letter from the Bank of Montecito when she certified in her application that she had reasonable assurance of sufficient financing to construct her proposed station and operate it for three months without revenues. The ALJ held that she did not demonstrate that this bank letter provided the required assurance, and he further found that her certification was not made in good faith. *Initial Decision* at 614 ¶ 149. Sczudlo has excepted, arguing that she is financially qualified and had every reason to rely on the bank letter. After reviewing Sczudlo's exceptions, Joelmart's reply, and the relevant parts of the record, we are affirming the ALJ's conclusion that Sczudlo is not financially qualified.

16. As noted above, a borrower relying on a bank loan must establish that it provided the bank with the financial data upon which the bank could review the loan request, that the bank did so, and that the bank is satisfied with the data. *Scioto Broadcasters*, 5 FCC Rcd at 5160. Sczudlo argues that she met this standard because she gave her financial statement to Phil Morreale, the Assistant Vice President with whom she dealt at the bank branch, who then ran a credit check with her consent. The problem is that Morreale testified that the letter he drafted and signed was nothing more than an invitation to apply for a loan and was not intended to suggest that the bank had any present intention to loan the requested $300,000 Sczudlo estimated she needed for the station. *See* Tr. 1735-36. Although the financial statement and favorable credit report gave the bank reason to encourage a future application from Sczudlo, Morreale said the bank had not received sufficient information to make any decision about a loan. Tr. 1726-27. In particular, the bank never received a business plan for the applicant from which it could evaluate Sczudlo's ability to repay a loan.[14] *Compare Scioto*, 5 FCC Rcd at 5160 ¶ 12 (the borrower's current business plan is one of the factors with which the bank should be familiar). In making her argument that she provided sufficient information, Sczudlo has emphasized that she could meet a collateral requirement. Morreale testified that he had discussed collateral with Sczudlo in the general sense that he would discuss with a client the way the bank would look at structuring a credit request. Tr. 1755, 1756-57. When asked hypothetically whether he would be likely to make a term loan of $300,000 to someone offering $300,000 of certificates of deposit as collateral, he testified that he could not say whether having such collateral would make a loan more or less likely, because collateral is a secondary concern to a borrower's ability to repay a loan. Tr. 1766. The lack of sufficient information from the bank's point of view coupled with the bank's lack of any decision about Sczudlo's purported collateral demonstrate that the elements of reasonable assurance have not been established here.[15]

17. In spite of this, Sczudlo argues that the information she provided should have been sufficient for the bank. But, the issue is whether Sczudlo had reasonable assurance of financing from the Bank of Montecito, which Morreale testified he did not give, not whether the bank's withholding of that assurance was unreasonable or from an excessive abundance of caution and not whether Sczudlo might qualify for a loan after having provided the required information. Where the employee who drafted and signed the letter upon which Sczudlo has relied testified that the letter was nothing more than an invitation to apply for a loan, we must affirm the ALJ's conclusion that Sczudlo has been unable to establish that she was financially qualified when she certified her qualifications to the Commis-

[14] In response to a question concerning the documents Morreale would normally expect to review in considering a loan request from Sczudlo, Morreale responded:

> In this situation, we had a personal financial statement, we would either have that transferred onto a bank form or have an attachment acknowledged and signed that carries some language that it's a true and correct copy and have some questions regarding bankruptcies and other items. We would request personal tax returns for two to three years on Ms. Sczudlo as this would be a new venture. We would request a business plan that would basically go through and cover the loan request, the repayment source. Assess the competition on how the situation would fit into the marketplace and be successful. We would ask for some projections and for the term of our loan that would exhibit the repayment ability of the proposal that we are looking at. In my understanding, this was to be a business loan that would be made to the radio station and not a personal loan to Ms. Sczudlo based solely on her personal financial strength.

Tr. 1732-1733. Morreale further testified that he did not believe he had seen tax returns, financial projections, any kind of business plan, or a written budget from Sczudlo. Tr. 1733.

[15] Sczudlo argues that the letter offers reasonable assurance when he said in his letter: "We are familiar with your plans to apply for a permit to construct a new FM station in Santa Barbara, California. The Bank of Montecito is willing to lend you up to $300,000 to finance the construction and operation of your proposed station..." Sczudlo Brief at p. 18. What Sczudlo omits is the qualifying language in the second sentence: "... provided the following conditions are met." Sczudlo Ex. 8, Ex. B. The conditions include meeting the bank's credit criteria. The letter also gives general information about loans. The letter does not express any opinion on Sczudlo's qualifications or provide specific information about the terms that would likely apply to a loan to Sczudlo. The bank letter neither adequately discusses the terms of the loan, such as collateral, interest rate,

sion. *See Initial Decision* at 614 ¶ 149.[16] There can be no reasonable assurance without the informed agreement of the lender upon whom the applicant has relied.[17]

18. Sczudlo makes the additional argument that the Commission should not elevate form over substance with regard to financial qualifications in this case, for she has the resources to construct and operate the station herself. She argues in her Brief at page 18, "The certificates of deposit that she offered to pledge are sufficient proof, putting aside the fact that she has a substantial annual income,[18] substantial investments in oil and gas and prior experience as an independent businessman." In addition to the fact that Sczudlo maintained throughout the hearing that she did not rely on her own funds when she certified to her financial qualifications, *see* Tr. 1680, 1703, this argument suffers from a failure of proof. She testified that, in dealing with the bank, she was "relying on the assets of Sczudlo & Associates," Tr. 1713, an oil leasing and gas exploration firm in which she had a one-sixth general partnership interest. Tr. 1163. This is consistent with the January 5, 1988, financial statement she gave Morreale, which showed certificates of deposit in Sczudlo & Associates partnership accounts, not in her personal accounts.[19] Sczudlo Ex. 8, Ex. A. The adequacy of these certificates of deposit as collateral for a loan is for the bank to consider, but, if Sczudlo is going to claim that these certificates of deposit are liquid assets available for financing the station, she must show that she has the authority to cash the partnership's certificates and use the funds for her broadcast station. She has not even claimed she could do that, let alone supported such a claim with documents from the partnership, and she has not said she is willing to do so.[20] While the Board is sensitive about placing form over substance, the applicant bears the burden of presenting the substance.[21] The record before us supports findings that Sczudlo intended to finance her station with a bank loan secured by assets in which she has an interest and that the bank on which she relied when she certified to her financial qualifications has not given her reasonable assurance of a loan. On this record, we must affirm the ALJ's conclusion that "Sczudlo has been unable to establish that she was financially qualified when she certified her qualifications." *Initial Decision* at 614 ¶ 149.[22]

19. Sczudlo also excepts to the ALJ's conclusion that "Sczudlo has not demonstrated that she acted in good faith when she certified her financial qualifications. "*Initial Decision* at 615 ¶ 154. Agreeing with the ALJ that she is not financially qualified for failing to met the objective "reasonable assurance" standard, the Board need not reach the subjective question of her good faith. *See Janice Fay Surber*, 5 FCC Rcd at 6159 ¶ 27; *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd at 7947; *see also* discussion of Chanel, *supra* ¶ 14.

ISIS BROADCAST GROUP

20. *Integration.* Isis Broadcast Group is a two-tiered corporation with three voting shareholders, Shirley G. Kennedy, Sylvia Y. Curtis, and Ione L. Graves, who collectively hold twenty-five percent of the stock, and one non-voting shareholder, Patrick Mellon, who holds the

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and repayment terms, nor shows that the bank has a present, firm intention to make the loan, future conditions permitting. *A. P. Walter, Jr.*, 6 FCC Rcd at 877 ¶ 11.

[16] Sczudlo argues, in effect, that it is her word against Morreale's about what oral assurances he gave her during their conversations. She testified that she made an oral proposal to Morreale, Tr. 1706, and discussed the specific terms of a loan that would apply if she were to apply at that time. Tr. 1214, 1215, 1686, 1687. Morreale testified that they talked only generally about the bank's requirements. Tr. 1728, 1740, 1743, 1755. We need not determine whose views of the conversation may be more accurate. It is clear under *Northampton* and *Port Huron* that any oral understandings on which applicants rely must be demonstrated by probative evidence, such as uncontroverted testimony from both parties to an understanding. Sczudlo has not presented such evidence here.

[17] Reasonable assurance is an objective standard. An applicant's subjective belief that it has a lender's assurance, or should have assurance, is not sufficient to meet the standard, although it may reflect on the applicant's intent when certifying to her qualifications. *See generally Janice Fay Surber*, 5 FCC Rcd at 6159 ¶ 27.

[18] According to the integration statement, she will terminate all employment in order to fulfill her full-time integration pledge. A company she listed in her January 5, 1988, financial statement as a source of more than half of her annual income has become inactive. Sczudlo Ex. 1, page 3.

[19] Her other assets listed in this financial statement in the aggregate do not cover the station's estimated costs. She also listed her now inactive company, Sun's Edge, Inc., and her interest in Sczudlo & Associates, which are not shown to be liquid. She has not offered any independent valuation of her nonliquid assets. *See generally Kaye-Smith Enterprises*, 98 FCC 2d 675, 678 ¶ 7 (Rev. Bd.) (nonliquid assets significantly in excess of the resources needed from those assets can be relied on for reasonable assurance if the value is supported by valid appraisal), *recon. denied*, 98 FCC 2d 670 (Rev. Bd. 1984), *review denied*, FCC 85-192, released April 19, 1985, *aff'd by judgment sub nom. Hoffart v. FCC*, 787 F.2d 675 (D.C. Cir. 1986).

[20] At the hearing, she submitted her financial statement as of February 11, 1991, which showed $100,000 in certificates of deposit in a Sczudlo & Associates partnership account and a total of $200,000 in certificates of deposit in two grantor trust accounts. *See* Sczudlo Ex. 8, Ex. C. At the same hearing session, she testified that, when she said she could finance the station herself, *see* Tr. 1703, she was referring to a grantor trust of which she is one of three primary beneficiaries and about which she has "authority to use $300,000 in CDs to pledge in the event I'm awarded the license." Tr. 1713. She testified she had asked the trustees about this authority sometime in 1991, although she always had this authority as one of the beneficiaries. Tr. 1719-20. As with the Sczudlo & Associates assets, however, the record does not reflect her authority to cash the trust assets for the station. Furthermore, given the inconsistencies between her testimony and her 1991 financial statement about what her allegedly available assets are, we cannot find that the record supports her claim of sufficient liquid personal assets for financing the station herself.

[21] The Commission requires probative evidence, not just self-serving generalities from the applicant. *See generally Northampton Media Associates*, 4 FCC Rcd at 5519 ¶ 16.

[22] Sczudlo has excepted to the ALJ's statement in ¶ 149 that the bank "was not familiar with Sczudlo's assets, credit history or her business plan when it issued the letter she relies on." Sczudlo correctly points out that she had given a financial statement to the bank and the bank had run a credit check on her. Although the ALJ's comment appears to be an overstatement, we do not give any decisional significance to it in light of the discussion above and also the ALJ's acknowledgment in ¶ 150 that the bank had the financial statement and credit check information.

remaining seventy-five percent of the stock.[23] *Initial Decision* at 603 ¶ 25. Isis claims full quantitative integration credit for its voting shareholders and insulation from consideration for Mellon's passive interest. The ALJ disagreed, however, and denied all integration credit to Isis under *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5601 (1991) because, in his view, Isis "has not demonstrated that the circumstances which gave rise to its proposal will result in Mellon being excluded from control." *Initial Decision* at 617 ¶ 171. Isis excepts to this conclusion, arguing it has demonstrated that it has honored the division between voting and non-voting shareholders. Joelmart and Benns support the *Initial Decision*. After reviewing the exceptions, replies, and the record, the Board concludes that Mellon's interest must be attributed to Isis along with the interests of the three voting stockholders.

21. Integration credit is ordinarily due "when the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out." *Coast TV*, 5 FCC Rcd 2751, 2752 ¶ 8 (1990), citing *Bradley, Hand & Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982). Where an applicant proposes passive as well as active owners, the interests of the passive owners will not be considered in the integration analysis if their role is truly passive. *See Anax Broadcasting Inc.*, 87 FCC 2d 483, 488 (1981). Where an applicant's purportedly passive owner actively participates in prosecuting the application after the applicant has formally organized itself as a two-tiered corporation, however, "the applicant has undermined our confidence that it will observe the active-passive distinction in the future," and the Commission will then attribute all passive interests in calculating integration credit. *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ 9 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991). Furthermore, the Commission will not award any integration credit at all "where the applicant has failed to demonstrate reliably that a nominally controlling principal ... will in fact exercise control or has otherwise left fundamental uncertainty about the true nature of its organizational structure." *Id.* 10. For example, if an assertedly active principal has exercised little, if any, significant control over the applicant and has not shown any real prospect for exercising control in the future, or if a person holding a passive interest is in a position to dominate the applicant's affairs, the Commission will not award even partial integration credit.

22. The Commission generally looks first to the applicant's post-formation record to evaluate the validity of an integration proposal. *Evergreen*, 6 FCC Rcd at 5600 ¶ 12. An important consideration is the extent to which the principals have adhered to the insulation provisions of their ownership documents. *Id.* at 5601. As the court noted in *Bechtel v. FCC*, 957 F. 2d 873, 878 (D.C. Cir. 1992), "a written agreement will not ordinarily be disregarded absent evidence that the agreement has been ignored or is otherwise a sham." Here, Isis' stock subscription agreement clearly provides for insulation between the voting and nonvoting shareholders by precluding Mellon from exercising "any authority or influence whatsoever over the prosecution of the application or the operation of the Corporation," including ownership of voting stock, employment at the station, or service as an officer or director. No one has challenged the adequacy of the language in this agreement, but Joelmart argues in its reply that Mellon has not been strictly passive, primarily because of the post-agreement flow of detailed information from Isis to Mellon.

23. Our focus in looking at Isis' post-formation activities is whether its voting stockholders acted independently of Mellon once Isis was formed as a two-tiered corporation and whether the voting shareholders can be expected to continue exercising *exclusive* managerial authority or control in the future. *See National Communications Industries*, 7 FCC Rcd 1703, 1704 ¶ 6 (1992); *see also Coastal Broadcast Partners*, 7 FCC Rcd 1432, 1434 ¶ 14 (1992); *Evergreen*, 6 FCC Rcd at 5602 ¶ 21. Under Isis' governing documents, the February 29, 1988, Stock Purchase Agreement, p. 2, and the March 23, 1988, Amendment to Stock Purchase Agreement, p. 3, Isis Ex. 1, Attach. B, Mellon is obligated to loan Isis the money it needs for prosecuting its application before the FCC and the courts. As Isis has needed funds, Kennedy has asked Mellon for specific amounts of money, and she has issued promissory notes from Isis for the amounts of the loans received. Tr. 205-206; Sczudlo Ex. 6. The Commission has clearly stated that "loaning money to the [applicant] does not ordinarily constitute material involvement requiring the attribution of [a passive owner's] interests." *Richardson Broadcast Group*, 7 FCC Rcd 1583, 1587 ¶ 25,[24] citing *Attribution of Ownership Interests*, 58 RR 2d 604, 620 (1985), *further recon. granted in part*, 1 FCC Rcd 802 (1986). It has looked, instead, at whether the nominally active owner has "exclusive control over [the applicant's] finances" as an indicium of managerial control. *Coastal*, 7 FCC Rcd at 1434 ¶ 17. In the recent *Richardson* case, the Commission also said that, where passive owners are involved in paying the applicant's bills or loans are used to monitor the management of the applicant or otherwise to exert influence over the actively-involved owners, it will attribute the passive owner's interests. 7 FCC Rcd at 1590 n. 16.

24. Here we have looked beyond the Stock Subscription Agreement and the stockholders' self-serving testimony that Mellon's advice has neither been asked nor offered, *see, e.g.*, Tr. 297, 361, 399, 486, to the working arrangement for providing Isis' actual funding and to the contacts between Kennedy and Mellon. The evidence shows that Isis has been kept on such a tight rein financially that Kennedy regularly had to appeal to Mellon for loans to pay the bills. Although Isis had written only about fifteen checks by the time of the hearing, Tr. 339, the record includes seven memoranda from Kennedy to Mellon asking for funds to pay the bills and references an additional one,[25] and Kennedy testified she sometimes made oral requests to Mellon--perhaps on two occasions. Tr. 241. Although Kennedy testified she did not always tell Mellon how she planned to use the money, Tr. 222-24, 259, each written request for money in the record identified the outstanding bills for which she planned to use the money being sought. Mellon did not personally pay the bills here, but if he did not send the money for the bills itemized in

[23] Kennedy holds 12.7 percent of the stock and is president and a director. Curtis holds 12.2 percent of the stock and is secretary/treasurer and a director. Graves holds 0.1 percent of the stock (1 share) and is a director.

[24] *Recon. dismissed*, FCC 92I-043, released May 22, 1992.

[25] *See* Sczudlo Ex. 2, 3, 4, Graziano Ex. 6, pp. 1, 2, 5, 7.

Kennedy's many requests, the bills could not be paid. [26] Whether or not Mellon had made explicit to Kennedy his interest in monitoring the management of Isis, Mellon clearly was in a position to monitor it through the practice followed for funding Isis' financial needs, and Kennedy clearly believed she "should give him an accounting" even though she also said that she "volunteered this information." Tr. 259-60. [27] Indeed, the record shows that, at his request, Kennedy sent him copies of "documents" earlier sent to him regarding one loan. Graziano Ex. 6, p. 8. The record also shows that Kennedy advised Mellon not only of the decision made about how to resolve an FAA problem with Isis' transmitter site and the estimated cost of amending the application to do so but also of counsel's advice about the alternatives.[28] The FAA problem is one of very few major issues addressed after the stockholders signed the Stock Purchase, Agreement.[29] The detailed information regularly provided by Kennedy goes far beyond the status information conveyed during a brief encounter at a McDonalds franchisee conference that the Commission found harmless in *Coastal Broadcast Partners*, 7 FCC Rcd at 1434 ¶ 15.[30]

25. From the record before us of Isis' precarious financial condition, Mellon's tight control of Isis' funding, and the flow of information to Mellon about Isis' bills and decision-making processes, as well as Mellon's failure to be forthcoming with funds when Kennedy has requested them, we cannot be confident that Isis' stockholders will observe the insulation provisions of the Stock Purchase Agreement and its amendment. Mellon, who bears virtually all of the financial risk here, clearly is in a position to monitor Isis' management through the funding arrangement, and Kennedy's testimony that, in her mind, she should give Mellon an accounting, shows that she expects to be monitored.[31] In the common carrier context the Commission has said, "Control of finances is a powerful and effective method of control of any business." *La Star Cellular Telephone Company*, FCC 92-243, released June 15, 1992, slip op. at 6 n. 14. We know of no reason why that is no less true for broadcasting.[32] Kennedy and Curtis do control the Isis bank account and write the checks, but the account appears to be little more than a conduit for paying the bills that Mellon is willing to have paid--when he is willing to send the money. The account is otherwise virtually empty. Control over an empty bank account under the circumstances here is not persuasive evidence that Kennedy and the other voting stockholders have the exclusive control over Isis' finances or exclusive management control overall necessary for insulating Mellon's equity interest from consideration under the Commission's comparative integration criterion.[33] Although Isis' stockholders, both voting and nonvoting, have protested their adherence to Isis' integration proposal in testimony, their post-formation actions do not persuade us that exclusive management control rests with the voting stockholders.

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[26] We note that the money was not always immediately forthcoming when Kennedy asked for it. In her October 28, 1988, memo, Kennedy renewed her October 4, 1988, request for funds, which were not received until December 8, 1988. Graziano Ex. 6, pp. 1, 2. On January 22, 1990, she wrote to renew her request of September 30, 1989, for money. Graziano Ex. 6, p. 5. She has described Isis' financial position to Mellon variously as "precarious" and "teetering on the edge of insolvency" when urging Mellon to send money. Graziano Ex. 6, pp. 1, 2.

[27] The presiding officer asked, "But [Mellon] has a right to ask you what the money is being spent on, does he not?" Kennedy replied, "I believe so." Tr. 223. She later testified that, although Mellon had not asked for an accounting, "I felt that he had a right to know what the money was being spent for, and I felt that I should give him an accounting." Tr. 260.

[28] On September 12, 1988, she wrote to Mellon "to report to you on a conference call September 8, 1988, between me, Charlie, and Lew; Sylvia absent." Sczudlo Ex. 3. Her memo reflected that Mellon was aware of the problem, but the record does not show how he became aware of it. Kennedy said she did not tell Mellon; but, "Probably, Charlie told him." Tr. 190. "Charlie" was one of Isis' attorneys.

[29] The record shows that the voting stockholders discussed settlement options without participation by Mellon. *See* Sczudlo Ex. 5 at 1; Tr. 294, 360, 399.

[30] Joelmart also points to the mailing of FCC orders to Mellon to support its argument that Mellon has not been strictly passive. We do not find this to be probative. *See generally Coastal*, 7 FCC Rcd at 1434 ¶ 15 (fact that counsel sent the nonvoting stockholder carbon copies of materials received by the voting stockholder did not show that the nonvoting stockholder was involved in prosecuting the application).

Joelmart also points to the fact that Mellon asked Kennedy to pay an engineering bill he had incurred before meeting Kennedy, and Kennedy did. We also do not find this to be probative by itself. Kennedy testified that Mellon merely asked her to pay the bill and that she chose to do so because she had used that consultant's transmitter site map for locating Isis' site. Tr. 201-02, 288. *See generally Coastal* ¶ 17 (interests of passive owner who paid bill at express direction of nominally active owner not attributed even though payment of bills is ordinarily a management function).

[31] See generally the Meeting Minutes and Corrected Meeting Minutes for Isis' August 16, 1990, directors meeting, which both provide in the financial report section:

> Ask Patrick Mellon to send Shirley Kennedy and Lew Paper

Sczudlo Ex. 5 at 2, 4. Although this minute entry does not support the finding advocated by Joelmart--that Mellon directly paid counsel--for the redacted information is identified by counsel only as "numbers," Tr. 200-01, and we do not know what came of this instruction, it does document Isis' willingness to ask Mellon to deal in some fashion with counsel in spite of his allegedly passive role. *See generally Aspen FM, Inc.*, 6 FCC Rcd 1602, 1602 ¶ 6 (written document is more probative than witness' self-serving testimony years later at a hearing), *erratum*, 6 FCC Rcd 4981 (1991). This further supports the Board's conclusion that Mellon is not fully insulated from management of Isis, at least in the minds of the voting stockholders. See also note 28, *supra*, noting Kennedy's testimony that she assumed counsel told Mellon of the FAA problem.

[32] In other contexts, the Commission looks at control of finances as an indicium of broadcast station control. *See, e.g., CanXus Broadcasting Corporation*, DA 92-747, released June 16, 1992 (M. Med. Bur.) (forfeiture for unauthorized transfer of control); *Benito B. Rish, M. D.*, 7 FCC Rcd 2628 (1991) (same).

[33] Even when a passive owner has put money into an escrow account, the Commission has found insufficient insulation where the escrow agent, who was authorized to pay the bills, was the limited partner's escrow agent and the general partners would not have access to the funds until after grant of the construction permit. *Evergreen* at 5607 n. 24.

26. Because the record does not afford sufficient assurance that Isis' voting stockholders will have exclusive management control, the question then is whether Isis' proposal merits any integration credit at all. As noted above, the test set forth by the Commission in *Royce* is whether the nominally controlling principal will exercise control or whether the applicant has otherwise left fundamental uncertainty about the true nature of its organization. The ALJ gave Isis no integration credit because of doubts about Mellon's passivity from the way Isis was organized and the testimony of Carol Hoffine, a principal of applicant Delta, that Mellon had told her that he would run the station and select the format. *Initial Decision* at 617 ¶ 171.[34] Although he found that Kennedy and Curtis had undertaken nominal functions since Isis had been organized, he did not find these bill-paying activities enough basis to determine whether Isis' voting stockholders would have some management control. *Id.*

27. The Board has looked at the record as a whole as directed by the Commission in *Evergreen*, 6 FCC Rcd at 5600 ¶ 12, and finds sufficient evidence of the management role of the voting stockholders to credit their integration proposal to the extent of their equity participation in Isis. Each of the voting stockholders paid for her stock at the same four-dollars-per-share price that Mellon paid. Kennedy bought 509 shares; Curtis, 490 shares; and Graves, 1 share. Mellon ultimately bought 3,000 shares. Stock Subscription Agreement, p. 1 and Amendment to Stock Subscription Agreement, p. 2, Isis Ex. 1, Attach. B; Tr. 205. Kennedy hired Isis' counsel and engineer--and selected persons other than those suggested by Mellon. Tr. 282-84. She brought Curtis and Graves into the applicant. Tr. 148-49, 282, 478-79. She selected Isis' initial and replacement sites. Tr. 288, 292. She prepared the budget. Tr. 210-11, 425-28. Curtis opened the checking account, and Kennedy and Curtis wrote the checks on the account.[35] Tr. 196-97.[36] Although the facts surrounding Mellon's selection of Kennedy as the person with whom to ally himself and the financial risk he bears raise questions about the soundness of Mellon's business judgment,[37] as Benns argues, and make this a close case, the roles played by the voting stockholders to date distinguish the Isis proposal from proposals not credited in *Evergreen*, *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990), *aff'd by judgment sub nom. Southeast Florida Limited Partnership v. FCC*, 947 F.2d 505 (D.C. Cir. 1991), or *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991), *recon. dismissed*, 7 FCC Rcd 658 (1992), cited in the *Initial Decision* or Joelmart's reply brief. In *Evergreen* the Commission did not credit a proposal where non-owners had strong ties to the owners, had initially planned to apply for the station, and planned to give up managerial broadcast positions for nonmanagement jobs at the station. 6 FCC Rcd at 5601-02 ¶ 18. In *Metroplex* the nominal general partner had no significant input in making the applicant's financial arrangements, was not consulted as required by the partnership agreement about the transfer of limited partners interests, and was given an inflated role at hearing that was not supported by the partnership agreement or the limited partners' depositions. 5 FCC Rcd at 5612. In *Poughkeepsie* the general partner had no role in formulating the applicant's engineering proposal, thought he was responsible for financing and was unaware that financing was being arranged behind his back, and did not open the bank account required by the partnership agreement for a year after the agreement was signed, during which time counsel handled the partnership's finances and went directly to a limited partner for money for the hearing fee. In *Poughkeepsie* it was this combination of factors in addition to the circumstances under which the general partner was re-

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[34] This statement allegedly was made in a telephone conversation about a week before the Santa Barbara applications were filed. Hoffine had called Kennedy to ask if Kennedy were interested in joining her in applying for the license. Kennedy, who did not know Hoffine, suggested that she call Mellon. Tr. 145. Hoffine did. Her March 4, 1988, telephone bill shows a one-minute call to Mellon's number on February 20 and two two-minute calls on February 21. Sczudlo Ex. 7. Isis does not deny that Mellon spoke with Hoffine, *Initial Decision* at 616 ¶ 161, but it adamantly denies that Mellon said he planned to run the station. *See* Tr. 458 for Mellon's denial. Nonetheless, the ALJ believed Hoffine rather than Mellon, because of Mellon's interest in running a station and Isis' exaggeration of the association between Mellon and Kennedy. *Id.* at 616-17 ¶¶ 167-68. The problem with Hoffine's allegation is that it is her word against Mellon's. There is no circumstantial evidence to support her version of the conversation, and there is only Mellon's argument that he has commitments on the East Coast to support his. In its Brief, Isis argues that Hoffine's description of the alleged conversation is preposterous for it assumes that Mellon would both disclose secret plans to a total stranger and decide on a format without studying the market. In its reply, Isis further argues that the conversation between Hoffine and Mellon was before Isis settled its organizational structure, and that even Hoffine admitted in testimony that no one's proposal was firm at the time of the conversation. See Tr. 1314-20. Isis also points out that Hoffine is a competitor of Isis whose testimony, therefore, should be given no evidentiary weight per *Barry Skidelsky*, 7 FCC Rcd 1, 66 ¶ 28 (Rev. Bd.) , *recon. denied*, 7 FCC Rcd 1392 (Rev. Bd. 1992). The Commission can consider relevant and material hearsay in administrative adjudications, but an important consideration is whether the declarants are disinterested. *Id.; Janice Fay Surber*, 5 FCC Rcd at 6158 ¶ 18. Here, given the lack of corroborating evidence, we find that Hoffine's hearsay testimony is entitled to little weight.

[35] Joelmart also argued that Isis has not observed corporate formalities with respect to Curtis' position as corporate treasurer for she had limited business and financial experience and did not handle all of Isis' financial matters. She did open Isis' checking account and write checks for Isis. Further, as the ALJ noted at Tr. 340-41, Curtis proposed to the Commission that she would be program manager for the station, not business manager. Although she shared responsibility for financial matters with Isis' president, Kennedy, this sharing of responsibility among the voting stockholders does not discredit her integration proposal or suggest that her proposed role is not *bona fide*. *Cf. National Communications Industries*, 7 FCC Rcd at 1705 n. 3 (integration proposal not discredited because one stockholder played a less significant role in prosecuting the application than the other two stockholders).

[36] Isis claims that Kennedy worked with counsel regarding Isis' organizational structure and settled on the corporate form even though Mellon had leaned toward a limited partnership. But, Mellon said he only initially suggested a partnership because it was the usual form with which he was familiar. He also said he had nothing to do with the decision or have any input into the process. Tr. 419, 476-77. Yet, Kennedy said the structure was decided in a meeting she attended with Mellon, counsel, and, perhaps, Curtis. Tr. 147, 157-59. The division of voting and non-voting shares was also decided at this meeting, but Kennedy could not remember much about the decision or who suggested the amounts, only that she did not suggest it and it seemed fair. Tr. 163-64.

[37] *See Initial Decision* at 603 ¶¶ 26-27, 29.

cruited that led the Commission to deny all integration credit. 6 FCC Rcd at 2498. *Pleasant Hope Broadcasting Co., L. P.*, 6 FCC Rcd 6553 (Rev. Bd. 1991), also cited by Joelmart, was vacated as moot in FCC 92I-03 (released January 9, 1992), and, therefore, has no precedential value.[38] Thus, under applicable Commission precedent, Isis is entitled to integration credit for the twenty-five percent equity interest represented by Kennedy's, Curtis' and Graves' stock.

PATRICIA WHEELER WODLINGER

28. Patricia Wheeler Wodlinger applied as a sole proprietor who proposed to be integrated full time into the management of the station. The ALJ found her application to be a sham and gave her no integration credit. He also assessed a diversification demerit against her because her husband did not promise to divest his half interest in Monett Communications, which owns two radio stations in Monett, Missouri, and will continue as a trustee of a station in Naples Park, Florida. Wodlinger has excepted to both conclusions. We deny these exceptions and affirm the ALJ's conclusions.

29. The ALJ denied integration credit because he found that Wodlinger and her husband have functioned as a marital unit in other broadcast ventures and will likely function the same way in this one. *Initial Decision* at 618 ¶¶ 179-80. She and her husband own and operate broadcast stations together. Although her husband is not disclosed as a principal here, he will manage the Santa Barbara station with her in the same sales manager position he occupies at other stations they own jointly. She has used some joint funds to prosecute the application. The banker promised financing on the basis of his experience as the banker to the company she and her husband own jointly. Her husband has advised her about this proceeding. Wodlinger does not dispute the facts but argues that the conclusion is sexist. The ALJ's conclusion that Wodlinger's spouse is not inactive is fully consistent with *Richard P. Bott, II*, 4 FCC Rcd 4924, 4929 (Rev. Bd. 1989),[39] upon which he relied. There, the applicant's history of shared control with her husband, the husband's substantial participation in prosecuting the application, and the use of joint funds formed the basis of the Board's conclusion that that applicant's alleged unitary management was not likely. The additional consideration in this case is the husband's proposed employment at the station in a management position. *See Evergreen*, 6 FCC Rcd at 5601-02 ¶ 18 (Commission denied all integration credit to applicant where nonowner spouses played substantial roles in prosecuting the application and proposed to be employees of the station); *Royce*, 5 FCC Rcd at 7064 ¶ 10 (no integration credit to be awarded where undisclosed principal has substantial control). Wodlinger's argument that the ALJ would not have reached the same conclusion if the Wodlingers' roles were reversed is purely speculative.

30. Wodlinger's challenge to the diversification demerit is equally without merit. She claimed that her pledge to divest her interests should include any interest she holds through the Commission's spousal attribution policy, even if the actual owner of that interest has not shown his consent to the divestiture. However, as she herself acknowledges in her exceptions, this is not the law. *See Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981). The Commission's recent *Clarification of Commission Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920 (1992), which eliminated the presumption that the media interests of one spouse should be attributed to the other for purposes of the Commission's ownership rules, did not address the application of spousal attribution in determining integration or diversification credit in the context of comparative hearings. *Id.* at 1920 n. 2. However, even if the *Clarification* applied to the comparative diversification factor, Mr. Wodlinger's influence and control over the applicant found here would make his interests attributable to Mrs. Wodlinger under the criteria listed in the *Clarification* at 1922-23 ¶ 16.

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[38] If Isis were given full credit for its integration proposal, its application would have to be remanded on a financial qualifications issue, as advocated by Chanel, Graziano, Joelmart, and Delta. Kennedy certified to Isis' financial qualifications on the basis of Mellon's financial statement attached to the February 26, 1988, letter from L. Patrick Mellon to Shirley Kennedy. Isis Ex. 7. In both that letter and the Stock Subscription Agreement, Isis Ex. 1, Attach. B, Mellon agreed to loan Isis the money for prosecuting, constructing and operating the proposed station, and Kennedy understood the money was to come from Mellon's own funds. Tr. 210-11, 216. Mellon's financial statement does not reflect any liability for the then-pending application of Virginia Communications Limited Partnership for a new Richmond, Virginia, FM station, in which Mellon was the General Partner and a twenty percent owner. MM Docket No. 87-352. In that proceeding Mellon testified that he certified to Virginia Communications' financial qualifications on the basis of his own financial assets. He further testified that he could not pursue any station purchases at that time because of his commitment to the Richmond project. Docket 87-352 Tr. 2123-24, 2128. Joint Petition to Enlarge Issues Against Isis Broadcast Group, March 6, 1991, Attach. 3.

The Commission has stated clearly that an applicant must establish the availability of funds to meet its estimated expenses through either sufficient net liquid assets on hand or committed sources of funds. *Northampton Media Associates*, 4 FCC Rcd at 5519 ¶ 15. "Where the lender is not a financial institution but a person, as in this case, the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time." *Id.* at ¶ 16. A balance sheet demonstrating that Mellon had net liquid assets to meet his commitment to the applicant would be sufficient under the *Northampton* standard as long as it showed sufficient net liquid assets to meet all of Mellon's obligations. *See Texas Communications Limited Partnership*, 5 FCC Rcd 5876, 5878 ¶ 14 (Rev. Bd. 1990) (non-bank lender must have sufficient resources to meet all of its current FCC obligations), *recon. denied*, 6 FCC Rcd 1260 (Rev. Bd. 1991), *rev. denied*, 6 FCC Rcd 5191 (1991) (agreeing with this point at 5192 ¶ 11), *recon. denied*, 7 FCC Rcd 3186 (1992) ; *see also Welch Communications, Inc.* 5 FCC Rcd 4850 (Rev. Bd. 1990). Here, where the balance sheet does not reflect Mellon's liability to the Richmond station and Kennedy's testimony about her knowledge of Mellon's obligation to the Richmond station is vague at best, *see* Tr. 170-71, a substantial and material question is raised as to whether Kennedy had sufficient information about Mellon's financial position to certify to Isis' financial qualifications.

[39] *Rev. denied*, 5 FCC rcd 2508 (1990), *aff'd by judgment sub nom. Radio Representatives, Inc. v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991).

DELTA BROADCASTING, INC.

31. Delta Broadcasting, Inc., is a corporation with two classes of stock. It seeks full integration credit on the basis of the proposed full-time management position of the sole Class A stockholder, Carol J. Hoffine, and argues that Class B stock is non-voting, so its ownership should not be considered in the integration analysis. The Class B stock was originally held by John P. Franklin, Jr., who sold it to Thomas P. Moyer, Jr., during the summer of 1990. The ALJ found this integration proposal to be unreliable and denied Delta any credit. *Initial Decision* at 620 ¶ 191. Delta has excepted to this conclusion.[40] After reviewing the pleadings and relevant parts of the record, the Board is granting Delta full integration credit.

32. Delta was formed as a corporation with common and preferred stock by Articles of Incorporation dated February 25, 1988, and filed with the Secretary of State of the State of California on February 26, 1988. Delta Ex. 2, Attach. A, pp. 2-3. Its incorporator amended the Articles of Incorporation to provide for two classes of common stock designated as Class A and Class B by Certificate of Amendment dated February 26, 1988, and filed with the Secretary of State on April 26, 1988. *Id.*, p. 5. This amendment authorized Delta's Board "to determine and alter the rights privileges and restrictions granted to or imposed upon any wholly unissued series of Common Stock, Class B." On April 12, 1988, the Board of Directors met. *Id.*, p. 6. During that meeting the Board "RESOLVED, that the Corporation sell and issue its shares ... to the persons and for the consideration set forth below." *Id.*, p. 9. Carol Hoffine was to receive 3,000 shares and John Franklin, 7,000 shares. No consideration was listed, no distinctions were made between Hoffine's and Franklin's stock, and nothing in the minutes suggests that the Board determined the rights, privileges and restrictions for Class B stock. Also dated April 12, 1988, is a document entitled "Unanimous Written Consent of Directors to Corporate Action," which is a resolution of the Board as follows:

> RESOLVED, that the holders of Class B Common Stock of the corporation shall not become actively involved in the operation or management of the media business of the corporation, shall not be employed by the corporation in any material capacity or as an independent contractor or agent, or provide any services on the corporation's behalf which directly or indirectly relate to the media enterprise of the corporation.

Id., p. 11 (1988 Consent). Also on April 12, 1988, the "first meeting of the Sole Shareholder" of Delta was held after the Board meeting. *Id.*, p. 12. According to the minutes, Hoffine was the only voting shareholder and the only shareholder present. The minutes reflect that the "Sole Shareholder" approved and adopted acts taken and decisions reached in the documents presented to the meeting and ratified them. *Id.*, pp. 12-13. Additional annual meetings of Delta's "Sole Voting Stockholder" were held February 24, 1989, and February 23, 1990, and the minutes of those meetings showed that Hoffine was the only holder of Class A common stock and the only shareholder present. *Id.*, pp. 20-23. A special meeting of the "Sole Voting Stockholder" was held July 12, 1990, during which Hoffine approved the purchase by Thomas P. Moyer, Jr., of the 7,000 shares of Class B stock held by Franklin. *Id.*, p. 24. The minutes of that meeting likewise show Hoffine as the only holder of Class A stock and the only stockholder present.

33. On August 21, 1990, after Moyer had replaced Franklin, local counsel for Delta wrote to Hoffine enclosing a document entitled "Unanimous Written Consent of Directors to Corporate Action," which provided that Class A stock shall have exclusive voting rights and power of the corporation and that Class B stock shall have no voting or conversion rights. *Id.*, p. 14-15. The 1990 Consent states, "This action is taken effective April 12, 1988," but Hoffine and Delta's other director, Jonatha Kentro, executed it some time after August 21, 1990, well after the June 1988 cut-off for amendments in this proceeding. *Id.*, p. 15; Tr. 1424-25. As the ALJ found, this is the first corporate document showing that the Class B stock has no voting rights. *Initial Decision* at 619 ¶ 186.[41]

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[40] Delta's exceptions as originally filed exceeded the page limit specified in 47 C.F.R. § 1.277(c). On March 10, 1992, Joelmart filed a Motion to Strike Consolidated Brief and Exceptions of Delta Broadcasting, Inc. On the same day, Delta filed a Petition for Leave to File Revised Consolidated Brief and Exceptions of Delta Broadcasting, Inc., arguing that counsel had mistakenly referred to an out-of-date copy of the Commission's rules and that, when realizing this mistake on the morning of March 10, 1992, had quickly deleted some material to conform to the page limits. Counsel stated no new material was added. This motion was opposed by Benns in its Opposition of Ying Hua Benns to Petition for Extension of Time filed March 16, 1992, and by Joelmart in its Opposition to Petition for Leave to File Revised Consolidated Brief and Exceptions filed March 19, 1992. Both argued that Delta achieved compliance with the page limit only by violating other procedural requirements. Delta filed an Opposition to Motion to Strike on March 19, 1992. On March 20, 1992, it filed a Petition for Leave to File Reply to "Opposition" on Ying Hua Benns and Revised Consolidated Brief & Exceptions. This was opposed by Benns on March 24, 1992, and Joelmart on March 27, 1992. Joelmart and Benns correctly state that the Commission's Rules provide for dismissal of exceptions not conforming to the procedural requirements. The Commission has dismissed nonconforming exceptions in other cases subject to being refiled in proper form within a short period of time. *See, e.g., Lt/Colonel Cyrus V. Edwards*, 7 FCC Rcd 890 (Rev. Bd. 1992); *Sunbelt Limited Partnership*, 6 FCC Rcd 6833 (Rev. Bd. 1991). In this case Delta refiled its exceptions before the Board acted on the pleadings before it without changing the substance of its arguments. We will accept Delta's exceptions as filed March 20, 1992. We, like the Commission, wish to make clear, however, "that we will not hesitate to summarily dispose of such procedurally deficient matters where circumstances warrant such action in the future." *Capitol City Broadcasting Company*, 7 FCC Rcd 2629 (1992). *See Lt/Colonel Cyrus V. Edwards*, FCC 92R-59, released July 22, 1992 (Rev. Bd.). We are denying Delta's request to reply to the oppositions of Joelmart and Benns as unauthorized by 47 C.F.R. § 1.277.

[41] Delta argues that this 1990 Consent was prepared contemporaneously with the Consent signed on April 12, 1988, which is described above, but its only alleged support for this view is language the ALJ struck from local counsel's letter explaining why the Consent was not signed earlier. Delta claims that the ALJ erred in striking the language under the hearsay rule because it was admissible as a declaration against the interest of counsel, which falls under an exception to the hearsay rule. However, as Graziano noted in its Reply at 8, the stricken language shows only that Delta's principals "inadvertently"

34. When faced with a similar issue in *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 ¶¶ 15-16 (1988), the Commission accepted "sworn and unrebutted testimony [confirming] that Victory's principals always intended for the corporation to have two classes of stock." In *Cuban-American Limited*, 5 FCC Rcd 3781, 3784 ¶ 21,[42] the Commission said that applicants are not required to establish their integration proposals as a legal certainty, so the failure to execute documents, standing alone, is not a sufficient basis for denying integration credit if an applicant can provide reasonable assurance that its proposed structure has been timely effectuated. If, however, the Commission is "presented with convincing evidence that ... non-voting shareholders are or will be in fact exercising influence or control over the ongoing business," the proposal will be discredited. *Victory Media* at 2074-75 ¶ 18. *See Coast TV*, 5 FCC Rcd at 2752 ¶ 8 (applicant has burden of showing it has adhered to its structure). Thus, consistent with this precedent, the question here is whether the parties to the Delta application timely decided to insulate the Class B shareholder as a passive owner and acted consistently with that intent. Here, Delta's Board resolution reflected in the 1988 Consent shows a pre-cut-off intent to insulate the Class B shareholder from involvement with the station. Its minutes of pre- and post-cut-off meetings show adherence to that intent in the corporate behavior reflected in them. Consistent with the documentary evidence, Hoffine testified in her direct written case that the interest of Class B stockholders "is passive and insulated in nature and practice," Delta Ex. 2, p. 1 n.1. During the hearing she said that Franklin's rights to vote were restricted from the outset. Tr. 1420-21. Franklin testified that his involvement with the station was strictly investment, that he did not want to be involved with working at the station, and that he never had anything to do with prosecuting the application. Tr. 1555-57. He understood that he was a "silent partner and [Hoffine] was to make all the decisions and do what needed to be done." Tr. 1556.[43]

35. Hoffine and the Class B stockholders did have contact, however. The record shows that Hoffine had conversations with Franklin about the status of the application and told him about Delta's original and amended transmitter site. Tr. 1509, 1548. She called him on occasion to get some money. Tr. 1509, 1545. She also told both Franklin and Moyer when he replaced Franklin about the relative strengths and weaknesses of the other applicants, and she discussed with each of them the possibility of settling the case. Tr. 1510-13. These contacts reflected in the record do not show that Franklin advised Hoffine about management matters during any of these conversations or in any other way undermined Hoffine's exclusive management authority. As the Commission instructed in *Coastal Broadcasting Partners*, 7 FCC Rcd at 1434 ¶ 15, an integration proposal is not undermined by limited contact and status information that does not undermine the active owner's exclusive management authority. *Compare Woods Communications Group*, FCC 92-306 ¶ 3, released July 23, 1992 ("exercise of influence by the nonvoting stockholder is not compatible with the concept of passive ownership"). Finally, although Franklin had not discussed with Hoffine any role in station construction, an area where he had some experience, and had not given it any thought, he answered "Yes" when asked whether his participation in construction could be addressed later. This single answer when considered in the context of the total record,[44] including Franklin's clear statement that he is involved only as an investor, does not show an intention to be involved in the future that would undermine Delta's integration proposal.[45]

36. Joelmart argues that the Board must also look at Delta's "formation facts," which show that Hoffine and Franklin hardly knew each other before being brought together, did not negotiate their interests, and did not find out much about each other. Hoffine contributed $3,000, while Franklin contributed $7,000 and was to contribute the application costs, the amount of which he had not discussed directly with Hoffine. He was aware of the likely costs, however, from his conversations with Jim Evans. In *Evergreen* the Commission said we generally should rely on the post-formation record to determine the bona fides of an integration showing "unless that record does not reliably establish that the nominally controlling owners will exercise exclusive control." 6 FCC Rcd at 5600 ¶ 12. The ALJ found that Hoffine's exclusive control was not established, in part because of the circumstances Joelmart referenced, and in part because Hoffine received some help from Jim Evans, her friend and Franklin's business partner. Evans had brought Hoffine and Franklin together, given Hoffine advice about putting the project together, and given Franklin information about the application process, costs, and the restrictions on a passive owner. *See* Tr. 1437-41, 1443, 1445, 1449-50, 1518, 1535, 1539-40, 1556. Evans had gained helpful knowledge as an applicant for a station in a nearby community. But, there are no allegations that Evans had any undisclosed interest in Delta or would benefit in any way if Delta were to receive a grant. Any conclusion that Hoffine's control was undermined because she and Franklin independently sought Evans' advice is purely speculative. *See Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984) ("mere suspicion" is not basis for ordering FCC to disregard an applicant's corporate structure); *see generally Oliver Kelley and Mary Ann Kelley*, 6 FCC Rcd 7377, 7379 ¶ 12 (Rev. Bd. 1991) (relying on assistance from a consultant is not

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failed to execute a document, not that counsel admitted responsibility for that failure. *See* Fed. R. Evid. 804(b)(3). Thus, the ALJ did not err in refusing to admit that part of counsel's letter into evidence. Furthermore, Hoffine testified that she "did not personally see the document on April 12th," Tr. 1428. That statement plus the difference in the style of the two Consents support the ALJ's skepticism about whether the Consent signed in 1990 had been created in 1988. *See* Tr. 1426-29.

[42] *Recon. dismissed sub nom. Miami Latino Broadcasting Corp.*, 5 FCC Rcd 7321 (1990).

[43] Because Franklin understood his role to be passive, we are not concerned that he was only "99 percent sure" that his Delta stock was non-voting. Tr. 1552.

[44] Franklin also testified, "But I do remember one occasion where she may have said something like you can't be involved in doing some certain thing and I think that had to do with going to the transmitter site or something. I don't remember exactly what it was." Tr. 1547.

[45] On one occasion Hoffine asked Franklin's son to copy something for Delta at the library, and she paid him a few dollars for doing this. Tr. 1515-16, 1549, 1555. The son was home from college. We do not find any significance in this single errand.

reason to deny integration credit), *review denied*, FCC 92-278, released July 2, 1992. Furthermore, while Delta's formation was not as businesslike as might be desirable in hindsight, the record shows that it was Franklin, the passive owner, rather than Hoffine, the active owner, who was vague about the details of the applicant. The record also shows that Hoffine had broadcast experience (Delta Ex. 3) and that she, not Franklin, was pursuing people to participate in an application with her: she contacted Kennedy and Mellon from the Isis applicant to discuss working together, and she asked Evans "if he had any names that he could suggest to me who might be interested in such a venture." Tr. 1439. She hired counsel and an engineer. Delta Ex. 2, p. 2. *See Weyburn Broadcasting Limited Partnership*, 6 FCC Rcd 1262, 1266 ¶ 25 (Rev. Bd. 1991) (integration proposal credited where active principal was moving force behind application), *rev. denied*, 6 FCC Rcd 4474 (1991). In contrast to *Evergreen* and other cases where the Commission denied all integration credit because the nominally active owner was merely a pawn of others, the "formation facts" here do not warrant discrediting Delta's proposal. *Compare, e.g., Poughkeepsie Broadcasting Limited; Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990).[46]

COMPARATIVE EVALUATION

37. The *Policy Statement* governing our comparative analysis sets forth two objectives for this analysis: the maximum diffusion of control of the media of mass communications and the best practicable service to the public. The Commission has set forth several factors for comparing applicants under these objectives. 1 FCC 2d at 394.[47] One of the factors relevant here is diversification of control of the media of mass communications, which is a primary objective of the licensing scheme and, thus, is "a factor of primary significance." *Id.* The other is full-time participation in station management by owners, which the Commission considers to be a factor of "substantial importance." *Id.* at 395. Although part-time participation also will be considered under this factor, the credit given an applicant drops sharply as the time spent at the station moves away from full-time, and no credit will be given if the owner does not plan to spend substantial amounts of time at the station. The Commission also considers certain attributes of the participating owners when evaluation the integration of ownership into management. The qualitative enhancements relevant here are local residence, including participation in civic affairs and other local activities indicating a knowledge of and interest in the welfare of the Community, membership in certain minority groups, and previous broadcast experience. *Id.* at 395-96; *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990).[48]

38. Delta, whose full quantitative integration has been restored for Hoffine's role as the sole voting shareholder, claims enhancement credit for Hoffine's residence in Santa Barbara since 1976 and involvement in civic activities there since 1980. The ALJ found that before 1984 Hoffine had lived in Santa Barbara five days a week and maintained a condominium outside the service area in Ventura County, where she was registered to vote and where she listed her address for her driver's license. He further found that she had made telephone calls from the condominium in 1988. *Initial Decision* at 613 ¶ 138. Although the ALJ drew no conclusions from these facts, Delta has taken exception to this characterization of her residence. She testified that she had worked in Santa Barbara and lived there five to seven days a week during the 1976-84 period. When she bought a house in Santa Barbara in 1984, she changed her voting residence. She also testified she kept the condominium, which she rented to someone who has since become a friend and with whom she stays on occasion when in that area. Tr. 1432-1437, 1517.[49] We need not decide whether Hoffine should be given integration credit for the time she spent in Santa Barbara before 1984 for, even without this credit, she is superior comparatively to Joelmart, Graziano Broadcasting, and Benns, the only other applicants entitled to credit for full or almost full integration.

39. Hoffine is entitled to local residence credit for living in Santa Barbara since at least 1984 and for her various civic activities dating back to 1980. With this credit plus credit for her broadcast experience in volunteer, staff and management positions between 1960 and 1984, *see Initial Decision* at 614 ¶ 139, she is entitled to a greater overall integration preference than Joelmart whose only claimed enhancement is that its principals, Mr. and Mrs. Silverman, lived in the Santa Barbara area part time from

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[46] The ALJ found that, after the ownership change, the record supports Delta's claim of control by Hoffine. *Initial Decision* at 620 ¶ 191. Joelmart does not dispute this but notes in a footnote to its Brief that Moyer did little to educate himself about Delta and decided to participate on the basis of one telephone conversation with Hoffine, whom he did not know. Tr. 1496, 1560. He did not check her background or look at financial projections or station values. Tr. 1563, 1568. Joelmart Brief, p. 17 n. 20. While these circumstances may reflect on Moyer's diligence as an investor, nothing in the record suggests that Moyer played anything other than an investor role. *See* Tr. 1574. Hoffine found Moyer to replace Franklin. Tr. 1482. Hoffine and Moyer knew about each other through a long-time mutual friend who had told each about the other over several years. Tr. 1521-22, 1562, 1573.

[47] After the decision in *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), questioning application of the comparative criteria, the Commission initiated a proceeding to reexamine and possibly improve its 1965 comparative criteria. *See Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992). Any changes announced at the end of this proceeding will be prospective. *See id.* at 2669; *Anchor Broadcasting Limited Partnership*, FCC 92-300 ¶ 20, released July 21, 1992.

[48] A gender preference previously was given to women and has been claimed by several of the applicants here. Subsequent to the adoption of the *Initial Decision*, this preference was held unconstitutional in *Lamprecht v. FCC*, 958 F. 2d 382 (D.C. Cir. 1992). In light of this ruling, enhancement credit for female ownership will be withheld. *See Eugene Walton*, 7 FCC Rcd 3237, 3239 n. 7 (1992).

[49] Delta bases its argument on *WRLJ, Inc.*, 99 FCC 2d 460 (Rev. Bd. 1984), in which an applicant was given enhancement credit for a principal who promised to move to the community of license for five days a week but planned to spend weekends with her family out of the service area. Delta also argues that Hoffine has gained knowledge of Santa Barbara through her occupation as a broadcast reporter between 1976 and 1984 and her current position as public relations director for the area Girl Scout Council. However, because she did not claim local residence credit below for these activities, *see* Delta Ex. 3, she cannot rely on them now to bolster her claim before the Board.

December 1986 to June 1987 and full time thereafter and first became involved in civic activities in 1987. The Silvermans joined a temple in Santa Barbara in 1987 and Mrs. Silverman became a member of the PTA that September. *See id.* at 606-07 ¶¶ 57-65. Most of their claimed activities began about the time they filed their application on March 1, 1988, or after filing and, thus, warrant minimal credit. *See, e.g., Oliver Kelley and Mary Ann Kelley*, 6 FCC Rcd at 7382 n. 15. Residence in the community after filing also is given minimal weight. *See id.; Colonial Communications, Inc.*, 6 FCC 2d 2296, 2297 ¶¶ 10-11 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992); *MTF Enterprises*, 99 FCC 2d 297, 300-01 (Rev. Bd. 1984), *rev. denied*, FCC 85-429, released August 2, 1985, *recon. dismissed*, FCC 85I-153, released October 31, 1985.

40. Joelmart has argued that it deserves a comparative coverage preference over Delta for serving 12,338 or seven percent more people over 612 more square kilometers than Delta. At best, this difference in an area with five or more aural services and no underserved areas would merit a very slight preference. *See Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485, 4485 ¶¶ 3-4 (1991) (marginal advantage from population differential of 29,968 people or 22 %); *Colonial Communications, Inc.*, 5 FCC Rcd 1967, 1969 ¶ 9 (Rev. Bd. 1990) (subsequent history omitted). Delta still prevails because even a slight integration advantage prevails over a slight coverage preference. *See Naguabo Broadcasting Company*, 7 FCC Rcd 1696, 1697 ¶ 8 (1992). Under the *Policy Statement* coverage is a factor that "can and should be considered." 1 FCC 2d at 398, although its weight diminishes significantly when the area to be served already has ample service. *See Simon Geller*, 90 FCC 2d 250, 276 ¶ 50 (1982) (subsequent history omitted). Integration weighs more heavily as a factor of "substantial importance." *Id.* at 395.[50]

41. With Hoffine's local residence/civic activities credit and credit for past broadcast experience, Delta is also superior to Graziano Broadcasting. Broadcasting is entitled to full-time credit for the integration of John Graziano, its ninety percent owner, who has promised to move to Santa Barbara to manage the station. *See Initial Decision* at 607. However, because the *Policy Statement* accords less weight to proposed future residence than to present residence of several years duration, 1 FCC 2d at 396, Broadcasting is inferior to Delta under this factor. Paul Graziano, Broadcasting's other owner, has lived in Santa Barbara since 1981 and has some civic involvement, *see Initial Decision* at 607,[51] but the limited integration credit due for his small ownership interest and proposed part-time involvement does not significantly enhance the minimal credit to which Broadcasting is entitled. Broadcasting's integration proposal for John Graziano is also enhanced by his broadcasting or related experience dating back to 1975. However, because past broadcast experience is of less significance than the local residence factor under the *Policy Statement*, 1 FCC 2d at 396, Broadcasting's credit for the broadcast experience of John Graziano, its ninety percent owner, would not overcome Delta's advantage for the local residence background of its one hundred percent owner, even if Graziano's broadcast experience were entitled to greater weight than Hoffine's experience.

42. In exceptions Broadcasting has argued that the ALJ erred in refusing to give John Graziano greater enhancement credit because of his continuing knowledge of Santa Barbara's changing interests and needs acquired through periodic business visits to Santa Barbara and analyses of the market while working for a radio format syndicator, radio sales representative firms, and a multiple station owner. Although the *Policy Statement* does provide for considering "any other local activities indicating a knowledge of and interest in the welfare of the Community" as part of an applicant's local residence background, 1 FCC 2d at 396, an applicant bears the burden of showing how claimed activities meet this standard. *See generally Ronald Sorenson*, 6 FCC Rcd 1952, 1953 ¶¶ 8-9, *recon. dismissed*, 6 FCC Rcd 6901 (1991). Broadcasting has describe John Graziano's activities primarily as market research and analysis in the Santa Barbara market, among others, which it analogizes to the ascertainment surveys previously required of broadcasters. But, Broadcasting's description of John Graziano's work shows that it has been focused on format preferences and associated revenues and advertising,[52] not the welfare of the community for which enhancement credit is given under the *Policy Statement*. John Graziano may well be familiar with Santa Barbara as a radio market, but Broadcasting has not shown how his work has made him familiar with Santa Barbara as a community. For this reason, Broadcasting's exception will be denied.

43. Delta and Benns are close under the integration factor. Both have broadcast experience, and the credit due Delta for Hoffine's local residence credit is balanced by the credit due Benns, an individual applicant, under the

[50] The ALJ found that the Silvermans are self-employed investors who each devote about three hours a week to managing their real estate investments and about fifteen hours a week investigating new investments, which they will discontinue if awarded the station. *Initial Decision* at 606 ¶ 55. P & T has questioned whether Joelmart can effectuate its integration commitment in light of the other business interests of Mr. and Mrs. Silverman, because, according to P & T, they must spend more than three hours a week dealing with their properties. Broadcasting questions whether they would relinquish their leisurely lifestyle for a full-time commitment. Wodlinger questions whether the Silvermans could afford to relinquish other activities if the radio station were not profitable. These points, which are mostly speculative, are addressed in the *Initial Decision* at 617-18 ¶¶ 172-74 and resolved in Joelmart's favor.

[51] Paul Graziano claims he should be credited with ownership of ten percent of the applicant's stock rather than the five percent with which the ALJ credited him. Even if he were credited with this extra interest, which he acquired from his former wife after the date by which applications could be amended as of right, the applicant's position in the comparative analysis would not substantially change. *See Initial Decision* at 618 ¶¶ 175-178.

[52] According to Graziano Broadcasting Ex. 3, his work included "analysis of the share of listenership by format .... as well as analysis of radio revenues by station and format," for the format syndicator, *id.* at 3, and selling and placing radio advertising for the sales representative firms, which included meetings with Santa Barbara station managers and conducting sales seminars, *id.* at 4-5. For the multiple station owner headquartered in Santa Barbara, John Graziano did research that included "analysis of programming preferences and station recognition and perception within the Santa Barbara community" as well as in other communities. *Id.* at 3. He also was employed as general manager for two stations outside Santa Barbara for whom he visited Santa Barbara to meet with advertisers. *Id.* at 2.

Commission's minority preference policy.[53] *See Fresno FM Limited Partnership*, 6 FCC Rcd 6998 (1991) (minority ownership and local residence have equal comparative significance), *recon. denied*, FCC 92-307, released July 9, 1992. Benns, however, has a slight diversification demerit. She owns 70.7 percent of WFLI, Inc., the licensee of the only AM station in Lookout Mountain, Tennessee, and the only TV station in Cleveland, Tennessee. *Initial Decision* at 611-12 ¶ 122-23. She also is the licensee of a low power television station in Chattanooga, Tennessee, that rebroadcasts the programming of her Cleveland station. Her husband holds the remaining interest in WFLI, Inc., and held a five percent equity interest in an FM station in Braddock, Pennsylvania, until August 1990, which are attributable to Benns under *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981). Although the demerit for this media ownership is not as great as it would be if the stations were in or near Santa Barbara, as Benns points out, *see Policy Statement*, 1 FCC 2d at 395, it is dispositive here because Hoffine has no other media interests.[54] *See Bible Broadcasting Network, Inc.*, FCC 92-307 ¶ 3, released July 22, 1992 (an applicant's slight overall integration preference was outweighed by its slight diversification demerit).

44. Benns has also challenged the diversification factor itself, arguing that its application makes no sense in light of the regulatory changes since it was adopted in the *Policy Statement* in 1965. Benns points specifically to changes in the Commission's multiple ownership rules allowing individuals to own more stations that they could in 1965 and the elimination of the Fairness Doctrine, both of which were premised on the growth of media outlets. The Commission found similar arguments unavailing in *F. E. M. Ray, Inc.*, FCC 92-309 ¶ 9, released July 23, 1992, "because the diversification factor validly reflects the Commission's traditional goal of seeking to promote diversity of viewpoints and preventing undue concentration of economic power." Although it has sought comment on whether it should alter the current procedures for considering diversification comparatively in *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd at 2666 ¶ 21, it said that nothing there appears to call into question "the overall validity of the public interest goal furthered by the diversification criterion." Benns also argues for the creation of a diversification preference for minority applicants to further the Commission's policy of encouraging minority ownership. This diversification preference apparently would apply without regard to an applicant's other media interests and would be in addition to the preference for minority ownership, now given under the integration factor. This argument, which was not made below, raises policy questions that are beyond the Board's authority in reviewing initial decisions. *See generally Compass Rose Communications Corp.*, 6 FCC Rcd 1518 (Rev. Bd. 1991), *rev. denied*, 6 FCC Rcd 4959 (1991); *Swan Broadcasting Limited*, 6 FCC Rcd 17 (Rev. Bd. 1990).

45. The remaining applicants will not be considered comparatively. Chanel and Sczudlo are not financially qualified to operate the stations they propose and, therefore, are not eligible for further consideration. With the attribution of seventy-five percent owner Mellon, Isis is entitled to integration credit only for twenty-five percent of its ownership, a disparity between the full or almost full integration to which others are entitled that cannot be overcome by qualitative attributes. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065-66 ¶ 17 (1989) (clear quantitative difference of 12.5 percent cannot be overcome by qualitative attributes), citing *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 ¶ 35 (Rev. Bd. 1981) (same) (subsequent history omitted). P & T has claimed integration credit only for fifty percent of its ownership, which, even if credited, is also too great a disparity to be overcome by qualitative attributes. *Id.* Wodlinger is entitled to no integration credit because of her husband's control over the applicant, and she has a demerit under the diversification factor that places her at a further disadvantage.

46. ACCORDINGLY, IT IS ORDERED That the Petition for Leave to File Revised Consolidated Brief and Exceptions of Delta Broadcasting, Inc., filed March 10, 1992, IS GRANTED; the Motion to Strike Consolidated Brief and Exceptions of Delta Broadcasting, Inc., filed by Joelmart, Inc., on March 10, 1992, IS DENIED; the Motion to Accept Reply, filed by Chanel, Inc., on March 11, 1992, IS GRANTED; the Petition for Leave to File Reply to "Opposition" of Ying Hua Benns & Revised Consolidated Brief & Exceptions of Delta Broadcasting, Inc., IS GRANTED IN PART (brief and exceptions accepted) AND DENIED IN PART (reply not accepted); and the Request for Oral Argument filed by Delta Broadcasting, Inc. on March 10, 1992, the Request for Oral Argument filed by Isis Broadcasting Group on March 16, 1992, and the Contingent Request of Ying Hua Benns for Oral Argument filed March 16, 1992, ARE DENIED.[55]

47. IT IS FURTHER ORDERED That the application of Delta Broadcasting, Inc., (File No. BPH-880301OL) for a construction permit for a new FM broadcast station at Santa Barbara, California, IS GRANTED.

48. IT IS FURTHER ORDERED That the applications of Isis Broadcast Group (File No. BPH-880301MG); Joelmart, Inc. (File No. BPH-880301MJ); Graziano Broadcasting Company (File No. BPH-880301NA); Patricia Wheeler Wodlinger (File No. BPH-880301ND); Chanel Broadcasting (File No. BPH-880301NH); P & T Commu-

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[53] Benns' promise to move to Santa Barbara in the future is given only minimal credit under the *Policy Statement*, 1 FCC Rcd at 396.

[54] Because Benns does not prevail in the comparative analysis, we need not reach the challenges to the *bona fides* of Benns' integration proposal. Chanel, Delta and Joelmart point out that Benns will maintain an interest in her other stations if granted the Santa Barbara station and argue that her proposal for accommodating all her commitments is not credible. *See* Benns Ex. 2, p. 3 where she says she will serve as an officer, director, and stockholder of WFLI, Inc. Delta questioned the permanence of Benns' commitment to Santa Barbara because she filed her application for Santa Barbara only six months after putting the Cleveland, TN, television station on the air. Chanel and Joelmart questioned whether the applicant Benns is the individual applicant she claims to be in light of her past history of partnership with her husband in broadcast ventures and his initial participation in the Santa Barbara application.

[55] The issues presented here are neither extraordinary nor complex. The Board foregoes argument where argument would not lend valuable assistance in resolving the issues before it. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1990).

nications, Inc. (File No. BPH-880301NO); Deborah Lynn Sczudlo (File No. BPH-880301OA); and Ying Hua Benns (File No. BPH-880301OE) ARE DENIED.

49. IT IS FURTHER ORDERED That the application of Santa Barbara Communications, Inc. (File No. BPH-880301NR) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-501

In re Applications of

KATE F. THOMAS	File No. BPH-890424MC
TIMOTHY Z. BARBER d/b/a DOUBLE B BROADCASTING	File No. BPH-890424MD
MARY L. HOOPER and CAROLYN B. TINSLEY	File No. BPH-890424ME
LADY BUG BROADCASTING COMPANY, INC.	File No. BPH-890424MF

For Construction Permit for a
New FM Station on Channel 281C2,
Union, Mississippi

Appearances

Lawrence J. Bernard, Jr., Esquire, on behalf of Kate F. Thomas; *John J. McVeigh, Esquire*, and *John K. Hane III, Esquire*, on behalf of Timothy Z. Barber d/b/a Double B Broadcasting; *Vincent J. Curtis, Jr., Esquire, Frank F. Jazzo, Esquire*, and *David N. Roberts, Esquire*, on behalf of Mary L. Hooper and Carolyn B. Tinsley; and *Israel Teitelbaum, Esquire*, on behalf of Lady Bug Broadcasting Company, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: July 28, 1992; Released: August 14, 1992

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, 5 FCC Rcd 6712 (1990) ("*HDO*"), the Chief, Audio Services Division, designated for consolidated hearing the mutually exclusive applications of Kate F. Thomas ("Thomas"), Timothy Z. Barber d/b/a Double B Broadcasting ("Barber"), Mary L. Hooper and Carolyn B. Tinsley ("H/T"), and Lady Bug Broadcasting Company, Inc. ("LBC"), for a construction permit for a new FM station on Channel 281C2 in Union, Mississippi.[1] The hearing issues specified in the *HDO* were as follows:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. By *Memorandum Opinions and Orders*, FCC 91M-863, released March 7, 1991, FCC 91M-2466, released August 9, 1991, and FCC 91M-2467, released August 9, 1991, the following issues were added to this proceeding:

> 3. To determine whether Kate F. Thomas solicited *ex parte* presentations in violation of the Commission's rules and, if so, whether Kate F. Thomas is basically qualified to become a Commission licensee.
>
> 4. To determine whether Kate F. Thomas is financially qualified to construct and operate her proposed FM station.
>
> 5. To determine whether Lady Bug Broadcasting Company, Inc., is financially qualified to construct and operate its proposed FM station.

Both the burden of proceeding and the burden of proof on Issues 3 and 4 were placed on Thomas. Similarly, both burdens on Issue 5 were placed on LBC.

3. By *Memorandum Opinion and Order*, FCC 91M-3180, released October 31, 1991, partial summary decision of Issue 5 was granted. Specifically, Issue 5 was resolved in LBC's favor with regard to the question of the availability of funds. However, summary decision was not warranted on the matter of LBC's cost estimates, and that portion of Issue 5 remains unresolved.

4. Prehearing conferences in this proceeding were held on January 17 and September 4, 1991. Hearings were held in Washington, D.C., on June 11, 12 and 13, 1991, and on February 11, 1992. The record was closed on February 11, 1992. (Tr. 963; *Order*, FCC 92M-198, released February 13, 1992.)

5. Proposed findings of fact and conclusions of law were filed by each applicant on April 2, 1992. Reply findings were filed on April 24, 1992.[2]

FINDINGS OF FACT

Standard Comparative Issue

Kate F. Thomas

6. *Structure and Integration*. Thomas is an individual applicant. No other person has any interest in her application and no other person will have any interest in her station if her application is granted. (Thomas Ex. 1, p. 1.) Thomas will serve as the full-time General Manager of her proposed station, devoting 40 hours per week to this position. (*Id.*) The 40 hour-per-week figure is an average; during some weeks she may work more than that or less than that. (Tr. 171.) As General Manager, Thomas will be solely responsible for developing and implementing all station financial, sales, programming and personnel policies. (Thomas Ex. 1, p. 1). She will hire, promote and supervise all station employees. (*Id.*) Typically, she will direct station activities during the hours of 8:00 a.m. to 5:00 p.m. each weekday, while also working nights and weekends if necessary. (*Id.*; Tr. 314-16.)

7. Thomas is currently the Executive Director of the Union Chamber of Commerce. (Tr. 156.) She is the only salaried employee of this organization. (*Id.*) While her position is part-time, calling for 27 hours of employment each week, she typically works more than 40 hours each week at this job. (Tr. 157, 170, 315-16.) Thomas has also

been involved in Union civic affairs, but has carried out her activities in various civic organizations while maintaining her 40 hours per week schedule at the Chamber of Commerce. (Tr. 317-18.) Thomas will resign from her current employment before her station begins operations. (Thomas Ex. 1, p. 1.) However, she plans to continue to perform all of the additional volunteer work for the Chamber of Commerce that she feasibly can. (Tr. 157-58.)

8. Thomas also owns a tree farm, but does not devote much time to it in a typical month. (Tr. 161-62.) In the 15 to 16 years she has owned it, on only one occasion, when there was a bug problem, has she devoted as much as one continuous week to its operation. (Tr. 162-64.)

9. Thomas was born within the primary service area of her proposed station and resided there until she was 19 years old. She returned to live within the area in August 1974 and has resided there ever since. (Thomas Ex. 1, p. 1.) Her house has a Union mailing address, but is located about 4 to 5 miles outside of the city's boundaries on a farm. (Barber Ex. 5; Thomas Ex. 6, Att. C, pp. 5-8.)

10. Thomas has participated in the following civic activities (Thomas Ex. 1, pp. 2-5):

(a) First Baptist Church of Union.

i. Member, 1974-present.

ii. Mission Education teacher (4 and 5-year-old class), 1975-80.

iii. Teacher, Summer Bible School, 1974-79.

iv. Sunday School teacher (Junior High girls), 1975-present. This activity typically takes about 2 to 4 hours of her time each week. (Tr. 174.)

v. Member of Youth Council and Recreation Committees, 1975-present.

vi. Member of Nominating Committee, 1975-77.

vii. Member of Finance Committee for the Construction of the Family Life Building, 1976-79.

viii. Member of Scholarship Committee for college students, 1989-present.

ix. Member of Transportation Committee, 1980-89.

x. Chairman and Chaperon for Senior High Class trip, 1984, 1985, 1986.

xi. Church Hostess, 1980-82.

xii. Coordinator and hostess for about 95 percent of all wedding receptions held at church, 1980-present. Two or three weddings are held each year and Thomas spends portions of 3 days during evenings and weekends on each wedding. (Tr. 175-78.)

(b) Union Public Schools

i. Secretary of the PTA, 1974-76.

ii. Secretary-Treasurer of the Union High School Athletic Booster Club, 1975-76.

(c) Union Present Day Club, an affiliate of the Mississippi Federation of Women's Clubs and the General Federation of Women's Clubs. Thomas typically devotes about 5 hours per month to this organization. (Tr. 178-80.)

i. Member, 1985-present.

ii. Recording Secretary, 1986-90.

iii. First Vice President, 1990-92.

iv. Community Improvement Chairman. Projects included a public literacy program in which illiterate adults were taught to read; Adopt-A-Highway and Clean-Up Union in which local civic organizations and businesses agreed to clean highways, the local park and the community center at least three times a year; and recycling, a community-wide program which established collection procedures for paper, cardboard, plastics, glass and aluminum/tin cans; income from this project is donated to the local Boy Scouts; 1986-90.

v. Awarded local, district and state Clubwoman of the Year awards, 1989.

vi. Chair of Public Relations/Communications Committee, 1988-90.

vii. Citizenship Chairman, 1988-90.

viii. Secretary to the President of District II, 1988-90.

ix. Chairman of Home Life Department, 1990-present.

x. Legislation Chairman of General Federation, 1990-present.

xi. Chairman of District II Community Improvement Program, 1990-present.

xii. Assisted two abused, homeless women and their children in locating housing, food, transportation, clothing, school supplies and employment, 1989.

(d) Member of Newton County Community Concerts Association Board, 1986-89.

(e) Member of Advisory Council of the Newton County Agricultural Extension Service, 1988-present. Meets with County Agent, County Extension representative and 4-H Club leader to assist in planning the local activities of this office. Thomas devotes about 10 hours each year to this activity. (Tr. 181-82.)

(f) Boy Scouts Review Board. Thomas serves on the Board for selection of Eagle Scouts, 1988-present.

(g) Jaycees. Helped establish Union Chapter, 1989.

(h) Brownie Troop No. 5. Helped establish new group, 1989.

(i) United Givers Fund. Driver coordinator, 1985-present.

(j) Union Chamber of Commerce (Volunteer). Thomas devotes 13 or more hours per week on a volunteer basis to these activities. (Tr. 158-59.)

i. Member, 1980-present.

ii. Member of Board of Directors, 1982-86.

iii. Treasurer, 1982-84.

iv. Vice President, 1984-85.

(k) Executive Director, Union Chamber of Commerce (part-time salaried position), 1985-present.

i. Health checks. Planned and coordinated free testing at City Hall for blood pressure, blood sugar, cholesterol, etc., 1988-present.

ii. Adopt-A-School program. Organized program under which local businesses and individuals have contributed about $50,000 per year to Union public schools, 1988-present.

iii. Water system. Worked on successful application for Community Block Grant from Mississippi Department of Economic Development to build water and sewer system to support new industry in Union and new water supply for the town, 1990-91.

iv. Housing. Worked on successful application for Minority Block Grant to provide new housing for 19 families, 1988-91.

v. Local Industry. Worked to attract new industry to Union; participated in efforts which led to the opening of four new manufacturing facilities with a potential for 500 new jobs which opened in the area during 1989-90, 1985-present.

vi. Summer Recreational Program. Coordinates and manages financial aspects of Summer Recreational Program involving 500 youths and 200 adults, 1985-present.

vii. Crimestoppers. Helped organize new program to solve and deter local crime, 1988.

viii. Mentally Disabled. Started an ongoing project in 1989 to establish a Union Workshop of the Mississippi Industries for the Developmentally Disabled ("MIDD"); although this project has not been completed, was instrumental in obtaining employment for three Union area residents with the Meridian MIDD Workshop, which awarded her a certificate of appreciation in March 1991.

11. *Diversification*. Thomas does not have any ownership interest in or association with any existing media of mass communications. (Thomas Ex. 1, p. 1.)

12. *Auxiliary Power*. Thomas will install auxiliary power generators at both her studios and transmitter to insure the continued operation of her station in the event of an interruption in regular electrical service. (Thomas Ex. 1, p. 5.)

Timothy Z. Barber d/b/a Double B Broadcasting

13. *Structure and Integration*. Barber is an individual applicant. If Barber is granted the Union construction permit, he will terminate and sever all connections with his present employment, or any employment he may then have, and will work full time, at least 40 hours per week, as General Manager of the new station. In that capacity, Barber will have overall supervisory responsibility for all aspects of the station's operations, including oversight of the station's entertainment, news, and public affairs programming. Barber will also have overall responsibility for the station's sales efforts, for making and implementing the station's budget, for developing station policies, and for the hiring, firing, and supervision of station personnel. (Barber Ex. 1, p. 1.)

14. Barber resided within the city-grade service area of his proposed facility between 1969 and 1975 at his parents' home in Newton, Mississippi. (Barber Ex. 1, p. 1.) During those years, Barber was between the ages of 14 and 20, and was a full-time student. (Tr. 67-68.) His parents still live in that home, and he visits them regularly. If his application is granted, Barber will move to and reside in Union. (Barber Ex. 1, pp. 1-2.)

15. Barber was a member of the Newton Jaycees from 1973 through 1974 while he was a full-time college student. (Barber Ex. 1, p. 2; Tr. 68-69.) He was never an officer of that organization, which held monthly dinner meetings (Tr. 68-69), but he helped with some public service announcements (Tr. 109-10). Barber was active in the Newton First Baptist Church from 1969 to 1975. He was in the youth choir and was active in other youth activities in the church. He was in the Newton High School Band from 1969 until 1973, and was Student Director of the band during his senior year. At East Central Junior College in Decatur, he was Treasurer of the sophomore class, and was on the college newspaper staff, and was a member of the marching band, the concert band, the stage band, and the All-State Band. East Central Junior College is within the city grade service area of Barber's proposed station. (Barber Ex. 1, p. 2.) Barber was State Director of the American Advertising Federation, Seventh District, which includes Union, from June 1989 through June 1991. (*Id.*) In that capacity, he was involved in putting together public service campaigns to fight illiteracy, and has encouraged support for Big Brothers and Big Sisters. (Tr. 88-89.) The American Advertising Federation is a business organization. (Tr. 57.) Since 1987 he has been Publicity Chairman of the Mississippi Wildlife Federation, which serves members of the public within the service area of his proposed station. (Barber Ex. 1, p. 2.)

Barber is currently employed as Local Sales Manager of radio stations WJDS(AM) and WMSI(FM), Jackson, Mississippi. He has worked there since January 1978. (Barber Ex. 1, pp. 2-3.) As Local Sales Manager, he is involved in motivating and training sales people to meet their goals. (Tr. 90.) Before being promoted to Local Sales Manager, he was Senior Account Executive. He started at the stations as a night-shift announcer, performed on-air and production duties, then moved into sales. In April 1991, he reached the highest total single month sales in the

station's history. Between 1973 and 1975 Barber worked part-time at WBKN(AM), Newton, Mississippi, and, during the latter part of that time, also worked at sister station WGOT(FM), then newly on the air. During his tenure at the Newton stations, he performed the following functions: on-air announcer and board engineer, sound mixing, and production. While this job was classified as "part-time," he worked more than 40 hours per week there on a "fairly regular" basis. After leaving WBKN/WGOT, he joined WSSO(AM) and WMSU(FM), Starkville, Mississippi, full-time as the morning on-air personality. After about six months, he began selling advertising in the afternoon, and then shifted over completely to sales during the second year of his tenure. He left the Starkville stations in 1977. (Barber Ex. 1, p. 3.)

17. *Diversification*. Barber has no interests in any media of mass communications. (Barber Ex. 1, p. 4.) As noted above, Barber is employed as Local Sales Manager of radio stations WJDS/WMSI(FM), Jackson, Mississippi, but has pledged to sever his connection with these stations if his application is granted. (*Id.*, at pp. 1-2.)

18. *Auxiliary Power*. Barber will install auxiliary power sources at his proposed station's main studio and main transmitter site. (Barber Ex. 2, p. 1.)

Mary L. Hooper and Carolyn B. Tinsley

19. *Structure and Integration*. H/T is a general partnership formed in August 1989 for the purpose of prosecuting the instant application. Mary L. Hooper ("Mrs. Hooper") owns 55 percent of the equity in the partnership and Carolyn B. Tinsley ("Mrs. Tinsley") owns 45 percent of the equity. (H/T Ex. 1, 2.) Mrs. Tinsley is an African-American. (H/T Ex. 3, p. 3.) Upon grant of the construction permit to H/T, both Mrs. Hooper and Mrs. Tinsley will resign their current employment and work full-time, at least 40 hours per week, at the station. (H/T Ex. 2, p. 2, and Ex. 3, p. 2.) H/T proposes to locate its studios in Union, which is a 30 to 45-minute drive from Mrs. Hooper's home. (Tr. 703-4.) Mrs. Hooper plans to leave the station each day in order to be home by about 4:30 p.m. (Tr. 704-5.) Mrs. Hooper realizes that she may have to stay at the station late and arrive early, and has made arrangements for child care on those occasions. (Tr. 705-6.) Neither Mrs. Hooper nor Mrs. Tinsley will hold any other employment position. (H/T Ex. 2, p. 2, and Ex. 3, p. 2.)

20. From 1986 until the present, Mrs. Hooper has worked part-time, 5 to 10 hours per week, as the accounting and computer supervisor for Hooper Electronics Supply Co. ("Electronics"). In this position, she supervises accounting and preparation of financial documents. (H/T Ex. 2, p. 3; Tr. 637.) Mrs. Tinsley has worked at East Mississippi State Hospital since January 1981. She was in the dietary department as a server until 1983, in the maintenance department cutting lawns and trimming trees for about 11 months, and in the housekeeping department as a night supervisor supervising the cleaning activities of two persons and handling maintenance emergencies. Since 1988, Mrs. Tinsley has worked the day shift in the housekeeping department, cleaning and vacuuming offices, but is no longer a supervisor. (H/T Ex. 3, p. 2; Tr. 344-51.)

21. Mrs. Hooper will be the full-time General Manager, and will direct and oversee the day-to-day operations and management of the station. Mrs. Hooper will have ultimate authority for the technical operations, finances, personnel, programming and administrative operations of the station. Mrs. Hooper will supervise all station employees except those engaged in sales. (H/T Ex. 2, p. 2.) Mrs. Hooper will also be in charge of the station's EEO program. (Tr. 708.) Mrs. Hooper will use her husband, Randy Hooper ("Mr. Hooper"), as a "sounding board" with respect to problems which may come up at the station. (Tr. 653.) Mrs. Tinsley will be the full-time Sales Manager. (H/T Ex. 3, p. 2.) Mrs. Hooper picked this position for Mrs. Tinsley to fill. (Tr. 409.) In this capacity, Mrs. Tinsley will be responsible for and direct all sales and promotional activities of the station. Mrs. Tinsley will supervise all employees engaged in sales. (H/T Ex. 3, p. 2.)[3] However, Mrs. Tinsley did not know how many employees she would be supervising. (Tr. 409.) Mrs. Tinsley has experience selling May Kay products, and has sold other things like tickets for fundraising activities. (Tr. 411-13.) Mrs. Tinsley did not know what a "spot" was, did not know how advertising rates were determined, and had never supervised any salespersons, but she plans on going to school or attending seminars to learn these things. (Tr. 413-15.) Mrs. Hooper could fire Mrs. Tinsley as Sales Manager (Tr. 428, 713) but, if she does, Mrs. Tinsley would still remain as a partner in H/T (Tr. 428).

22. Mrs. Hooper has lived within the station's proposed service area for the past 14 years. (H/T Ex. 2, p. 2.) For 18 months, while she was pursuing a doctorate at Mississippi State University, Mrs. Hooper spent Monday through Thursday afternoon or Friday morning in Starkville, Mississippi. (Tr. 636.) Mrs. Hooper currently lives in Meridian, Mississippi, which is within the proposed station's 1 mV/m service area. She has lived at her current address for the past five years and will continue to live there with her husband and five children if her application is granted. (H/T Ex. 2, p. 2; Tr. 640.)

23. Mrs. Tinsley was born in Meridian and has lived within the station's proposed service area her whole life. She plans to stay in Meridian if her application is granted. (H/T Ex. 3, p. 2.)

24. In 1986, Mrs. Hooper was named the Meridian Jaycees Outstanding Young Woman of the Year. She is the Vice President of the Poplar Springs Elementary School Parent-Teacher Association. Mrs. Hooper is on the executive board of the Choctaw Area Council of Boy Scouts of America and is a Brownie Scout co-leader for the Girl Scouts of America, Meridian Council. Mrs. Hooper serves on the Talented and Gifted Program Advisory Council of the Meridian Public Schools. From 1982 to 1984 Mrs. Hooper was on the board of directors and was membership chairperson of the Pilot Club, a local service organization. From 1982 to 1984, she was on the executive board of the 1897 Daisies, Mississippi Federated Women's Club. From 1982 to 1984, Mrs. Hooper also served on the Meridian Restoration Foundation, and from 1983 to 1984, was a member of the Meridian Symphony League. From 1988 to 1989 Mrs. Hooper was the president of the local United Methodist Women. From 1984 to 1988, she was vice president, and from 1981 to 1984 she was Global Concerns chairperson of that organization. Mrs. Hooper is a member of the Administrative Board and the Council on Ministries, and is the Missions Chairperson at Central United Methodist Church in Meridian. She has previously served on the board of trustees and finance committee, and in other capacities, at Central United Methodist Church. (H/T Ex. 2, pp. 3-4.) None of Mrs. Hooper's civic activities occurred in Union. (Tr. 710.)

25. Mrs. Tinsley has been director of the Youth Department at Grace Baptist Church in Meridian since late 1988. (H/T Ex. 3, p. 2; Tr. 420.) As Youth Director she is responsible for children ages 2 to 12 and coordinated Easter, Mothers Day, and Christmas programs as well as field days for the children. (Tr. 420-21.) She has been president of the Junior Choir at her church for the year preceding her testimony, and helps coordinate choir activities. (H/T Ex. 3, pp. 2-3; Tr. 422-24.)

26. The H/T partnership is the successor as applicant to an earlier partnership between Mr. and Mrs. Hooper. Specifically, when the application in question was filed on April 24, 1989, the applicant was a general partnership composed of Mr. and Mrs. Hooper, each of whom held a 50 percent interest. (LBC Ex. 7; Tr. 528-29, 663-64.) Mr. Hooper first found out from T. L. Clayton that the Union frequency was available sometime before the opening of the filing window. (Tr. 516-17.) Clayton recommended that Mr. Hooper contact Gene Sisk, an engineer, for further information. Mr. Hooper promptly called Sisk and, within a week, hired him to do the engineering work for the application. (Tr. 518-19.) Sisk also recommended Frank Jazzo of Fletcher, Heald & Hildreth, as counsel, and Mr. Hooper hired Jazzo. (Tr. 521.) Jazzo explained to Mr. Hooper how the FCC awards frequencies based on comparative criteria and explained the advantages of having women or minorities as part of the application. (Tr. 524.)

27. The night after he spoke to Sisk, Mr. Hooper told Mrs. Hooper about the application and told her he was interested in it. (Tr. 622.) They discussed being partners in the application, and decided to pursue it. They discussed making it a partnership, similar to several joint real estate ventures they have, because family money would be involved. (Tr. 641-43.) All of the Hoopers' business activities are done in full partnership with each other. (Tr. 652-53.) Before they filed their application, Mr. and Mrs. Hooper signed a written general partnership agreement on the advice of their counsel. (LBC Ex. 7; Tr. 526-27, 651-52.)

28. Mr. Hooper located the transmitter site. (Tr. 530-32.) He initially made two trips looking for a site, the first trip alone and the second with his mother, Shirley Hooper, because she is from Union and was familiar with the area. (Tr. 530-33.) Mrs. Hooper did not accompany Mr. Hooper on either of those searches (Tr. 646.) Within a few days after Mr. Hooper's second trip, he purchased a parcel of land in the names of himself and Mrs. Hooper. (Tr. 534-35.)

29. After Mr. Hooper purchased the property, Sisk informed him that this site should not be used, and Mr. Hooper and his mother made a third trip to look for potential sites. On this trip, the site ultimately used in the application was found, and reasonable assurance of its availability was obtained. (LBC Ex. 8; Tr. 540-42.) Mrs. Hooper did not go on the third trip because she was pregnant, and was not involved in the selection of this site. (Tr. 541-43.)

30. Mr. Hooper obtained reasonable assurance of financing for the proposed station after meeting with his banker, Charles Young. Mr. Hooper showed Young a budget he had worked up. Mrs. Hooper was not involved in the meetings with Young. (Tr. 536-38.)

31. Mr. Hooper completed the FCC application form. (Tr. 522.) Mrs. Hooper provided input into the application, including the EEO section, through family discussions. (Tr. 646-48.) Mrs. Hooper did not perform any of the specific tasks leading up to the filing of the application due to her pregnancy. (Tr. 643-45.) However, she did speak with Mr. Hooper on a daily basis and those discussions included the FCC application. (Tr. 643, 648.) Mrs. Hooper never spoke to either Sisk or Jazzo prior to the filing of the application. (Tr. 528, 648, 651.)

32. In early August 1989, the Hoopers decided to amend their application because, based on their counsel's comparative analysis, they would only place third in the competition for the station. (Tr. 543, 654.) Counsel advised Mr. Hooper that a Black female who lived in Union would enhance the applicant's position, and the Hoopers decided to seek such an individual. (Tr. 547-48, 654.)

33. The Hoopers discussed candidates and came up with Mrs. Tinsley. The Hoopers were concerned because Mrs. Tinsley, although a minority, was not a Union resident and lacked broadcast experience. (Tr. 548.) She was, however, an area resident and had civic activities. (Tr. 657.) In considering other potential candidates, Mr. Hooper also contacted Clayton, who suggested a Ms. Hopson as a possible partner. Mr. Hooper interviewed Hopson by himself and then called Jazzo on the speakerphone and they both talked to her. (Tr. 548-49.) Mrs. Hooper did not speak with her. (Tr. 549, 656.) However, the Hoopers did not believe she would be a strong partner due to questions about her broadcast background. They were pressed for time and decided that Mrs. Tinsley would be a better choice as a partner than Ms. Hopson. (Tr. 549-51, 657-58.) In making their decision, the Hoopers believed that Mrs. Hooper could work well with Mrs. Tinsley because they could get along together. (Tr. 551-52.) Mrs. Hooper knew and liked Mrs. Tinsley, and believed she could work with her. (Tr. 657.) The Hoopers knew Mr. and Mrs. Tinsley through work and company parties. They did not see each other socially outside of a company party or business setting. (Tr. 553.)

34. After the Hoopers had decided on Mrs. Tinsley, Mr. Hooper approached Mrs. Tinsley's husband, Don, who is the warehouse manager at Electronics, and asked him to talk to her about the station. (Tr. 355, 552, 656-57.) Mr. Tinsley said he would go home and discuss the offer with Mrs. Tinsley. (Tr. 656-57.) When told about the chance to be a partner, Mrs. Tinsley, who was tired of her job at the hospital and hoped to find a new career, was "glowing at the opportunity." (Tr. 353-55.) Mr. Tinsley contacted Mr. Hooper the next day to say his wife was interested. (Tr. 657.) Mr. Hooper asked Mr. Tinsley to invite his wife to come by Mr. Hooper's office during her lunch hour to discuss the station. (Tr. 553.)

35. Mr. Hooper and Mrs. Tinsley met during Mrs. Tinsley's lunch hour. (Tr. 554.) Mr. Hooper interviewed Mrs. Tinsley and told her about the application. He told her about the comparative analysis and why the applicant would probably lose with Mr. Hooper as a partner. (Tr. 554.) Mr. Hooper told Mrs. Tinsley she would be a partner in the station and that he was no longer going to be a part of the applicant because there was nothing to be gained for either him or Mrs. Hooper if he remained part of the applicant. He explained that the Hoopers had decided it would be better if Mrs. Hooper had controlling interest and found another partner. (Tr. 555.)

36. Mrs. Tinsley told Mr. Hooper she was interested in being a partner and would love the opportunity to work with Mrs. Hooper, but did not have any money to invest. (Tr. 358, 555, 572-73.) Mr. Hooper told her not to worry about the money. (Tr. 555.) He told her that she would have 45 percent of the partnership and would only be

responsible for contributing $450 to the partnership. (Tr. 436-37, 479, 658.) The division of the partnership interests was picked arbitrarily by the Hoopers, with the only issue being Mrs. Hooper retaining control. (Tr. 659.)

37. During the meeting, Mr. Hooper and Mrs. Tinsley spoke to Jazzo on the speakerphone about Mrs. Tinsley's attributes as a partner. (Tr. 359-60, 555-56.) Jazzo asked Mrs. Tinsley about her employment, civic activities and broadcasting experience. (Tr. 359-60.) Mrs. Tinsley did not ask any questions of Mr. Hooper or Jazzo. (Tr. 360-62.) That evening, the Hoopers discussed Mrs. Tinsley's qualifications and both agreed to bring in Mrs. Tinsley as a partner. (Tr. 556.)

38. Mrs. Tinsley came back to Mr. Hooper's office the next day during her lunch hour. (Tr. 560, 574.) Mr. Hooper offered her a share in the partnership at that time. (Tr. 560-61.) They spoke with Jazzo and told him that Mr. and Mrs. Hooper decided that Mrs. Tinsley would be the new partner in the application. Mr. Hooper asked Jazzo if there was anything he needed to go over before getting out of the application. (Tr. 560.) Mr. Hooper did not discuss with Mrs. Tinsley what her job at the radio station would be. (Tr. 362, 554.) At this time, Mrs. Tinsley did not know, and was not really concerned about, what her job would be. (Tr. 362.) Nor was Mrs. Tinsley's salary at the station discussed. (Tr. 377-78.)

39. Mr. Hooper believed he was no longer a partner after that meeting. However, Mr. Hooper never signed any document by which he gave up or sold his partnership interest. (Tr. 560-61.) Mrs. Hooper considered the Hoopers' partnership agreement to be "null and void" once Mr. Hooper left the application. (Tr. 663-64.)

40. On August 17, 1989, an amendment was filed as a matter of right to the Hoopers' original application. The amendment substituted the H/T partnership for the Hoopers' partnership. (LBC Ex. 4.) The amended application was signed by both Mrs. Hooper and Mrs. Tinsley on August 16, 1989. (*Id.*, at p. 9.)

41. Jazzo prepared the amended application in consultation with Mrs. Hooper. (Tr. 661-62.) Mrs. Hooper and Mrs. Tinsley met at Electronics where they signed the amended application. (Tr. 366, 393, 672.) Mrs. Tinsley had already received a copy of the amended application from Jazzo, and had reviewed it before signing. (Tr. 366, 392.) There was a sense of urgency about getting the amendment signed; they were working on a deadline. (Tr. 672.) When Mrs. Hooper called Mrs. Tinsley to come to Electronics and sign the application, Mrs. Tinsley responded: "What are you telling me, I got a job?" Mrs. Tinsley understood that she was going there to fill out an employment application. (Tr. 391.) Mrs. Tinsley did not ask any questions about the amended application prior to signing it. (Tr. 366.)

42. The amended application contains a reaffirmation of the applicant's financial qualifications. (LBC Ex. 4, pp. 7, 12.) Mrs. Tinsley did not know what this meant because she does not deal with the finances. (Tr. 394-96.) Mrs. Tinsley believed she was "covered" with respect to financing because she was only obligated to contribute $450 to the partnership, and she knew she could do that. (Tr. 396-97.) Mrs. Tinsley believed Mrs. Hooper had sufficient liquid assets but she did not ask Mrs. Hooper about this. Nor did Mrs. Tinsley have any personal knowledge about whether the answers to the financial qualifications questions in the amended application were true. (Tr. 398.) Mrs. Tinsley did not know about H/T's public notice in the newspaper until a friend told her that she saw Mrs. Tinsley's name in the paper. (Tr. 437-39.) Mrs. Tinsley did not know whether H/T had a public file. (Tr. 441.)

43. Jazzo drafted a new partnership agreement after consultation with Mr. Hooper and Mrs. Tinsley. (Tr. 660.) The only difference between the two partnership agreements was the division of the ownership percentages and the cash call provision. (Tr. 660-61.) Jazzo told Mrs. Hooper that the new partnership agreement was drawn up in order to protect Mrs. Tinsley. (Tr. 674.)

44. The H/T partnership agreement was signed by Mrs. Hooper on August 17, 1989, and by Mrs. Tinsley on August 21, 1989. (LBC Ex. 5, p. 2.) When Mrs. Hooper received the agreement on August 17, 1989, she invited Mr. and Mrs. Tinsley to her house to discuss and sign it that night. Mrs. Tinsley was unable to do that so Mrs. Hooper took it to Mrs. Tinsley's place of employment on August 21, 1989, at which time Mrs. Tinsley signed the agreement. (Tr. 370, 673.) Mrs. Hooper understood that, under Mississippi law, an oral partnership agreement existed from the time both partners signed the amended application on August 16, 1989. (Tr. 663-65.) Mrs. Tinsley never consulted with anyone about the partnership agreement before she signed it and she was not aware of the legal obligations of a general partner until Jazzo's partner Vincent Curtis explained them to her before the depositions in this case in April 1991. (Tr. 482-83.)

45. Pursuant to the new partnership agreement, additional contributions of capital to the partnership can be made only upon the agreement of both partners. In addition, the partners may pay expenses on behalf of the partnership and those payments are deemed to be loans. Further, both partners will share in the net profits and losses of the partnership in accordance with their respective equity interests. However, any loans by the partners to the partnership must be repaid before any distribution of profits is made. (LBC Ex. 5; Tr. 659-60.)

46. Any money Mrs. Hooper advances to the H/T partnership is considered a loan. (Tr. 659.) These loans are documented solely by the checks written for them. (Tr. 692-93.) The money advanced for these loans comes from the Hoopers' jointly held assets, which Mrs. Hooper considers as much hers as they are Mr. Hooper's. (Tr. 694, 697.) Although Mrs. Hooper believes the partnership is legally obligated to repay the loans she makes (Tr. 693-94), if the H/T application is not successful Mrs. Tinsley will have no responsibility to repay the loans made to the partnership by Mrs. Hooper. (Tr. 659.)

47. Mrs. Hooper has known from the outset that Mrs. Tinsley's financial resources are very limited. (Tr. 375, 695-96.) It was understood that Mrs. Hooper would stand behind the financial aspects of the partnership. (Tr. 696.) Mrs. Hooper and Mrs. Tinsley have an understanding that Mrs. Tinsley will not have to put more than $450 into the partnership and that, if the application fails, she will lose her $450, but no more. (Tr. 376-77.) Indeed, Mrs. Tinsley believed that she would not be liable for any obligations other than her $450 contribution. (Tr. 375, 377, 436-37, 477, 478-79.) Mrs. Tinsley was asked, hypothetically, whether, in light of her 45 percent equity interest in H/T, she would be obligated to repay 45 percent of any of the money loaned to H/T by Mrs. Hooper, and she responded in the negative. (Tr. 504-5.) Mrs. Tinsley did not ask why she was getting 45 percent of the partnership without having to contribute more than $450. (Tr. 437.)

48. While Mr. Hooper was still part of the applicant, counsel suggested that a new reasonable assurance of financing letter be obtained for the H/T partnership. (Tr. 608-9.) Mr. Hooper talked to Charles Young at Eastover Bank For Savings, where he had obtained the letter of reasonable assurance for the partnership between him and his wife. He told Young there would be a new partnership between Mrs. Hooper and Mrs. Tinsley to replace the one between the Hoopers, and asked if Young could prepare the same type of bank letter for the new partnership as he had for the old one. (Tr. 564.) Young provided the requested letter, which was dated August 16, 1989, and addressed to both Mrs. Hooper and Mrs. Tinsley. (Barber Ex. 7; Tr. 564.) Mrs. Tinsley had nothing to do with obtaining this letter (Tr. 450-51), and the first time she saw it was at her April 1991 deposition (Tr. 445-46, 456).

49. In mid-March 1991, subsequent to the filing of the amended application, Mrs. Hooper told Mr. Hooper that she needed to obtain a new bank letter but was having trouble meeting with Young. (Tr. 565, 609-10, 670.) Mrs. Hooper had gone to the bank to meet with Young, who was not in his office. (Tr. 610.) Mr. Hooper called Young's secretary and asked if she could get Young to prepare a letter like the one he previously prepared. (Tr. 565, 610.) The secretary told Mr. Hooper that Young was out of town and could not sign anything until the next day. (Tr. 625.) Young subsequently provided the requested letter, which was dated March 13, 1991, and addressed to both Mrs. Hooper and Mrs. Tinsley. (Barber Ex. 8.) Mrs. Tinsley had nothing to do with getting this letter. (Tr. 462.)

50. Mrs. Hooper and Mrs. Tinsley opened a joint account for the applicant in March 1991 at the Eastover Bank. (Tr. 675, 677.) Mrs. Hooper told Mrs. Tinsley that it was time to open such an account (Tr. 381), and that it was time for them to meet the banker (Tr. 384-85). Mrs. Hooper keeps the checkbook and Mrs. Tinsley has never written a check on the account. Nor has Mrs. Tinsley ever seen a bank statement for the joint account. (Tr. 473-74.) To pay H/T bills, Mrs. Hooper writes a check on her joint account with Mr. Hooper and deposits it into the H/T account, then writes a H/T check for the bill. (Tr. 698, 700.) Prior to the time the H/T joint account was opened, the applicant's expenses had been paid through an account in the name of Mrs. Hooper at Trustmark Bank. (Tr. 675-77.) That earlier account had originally been opened in the name of Mr. and Mrs. Hooper, but after Mr. Hooper dropped out of the application he was removed as a signatory. The Hoopers' applicant account was different from their family account. (Tr. 675-77.) At the time the H/T joint account was opened Mrs. Tinsley made her $450 contribution to the partnership. (LBC Ex. 6; Tr. 379-80, 388, 677.) Between August 1989 and March 1991, no one asked Mrs. Tinsley for her $450 contribution. (Tr. 470.)

51. Mrs. Hooper and Mrs. Tinsley have spoken several times since they opened up the joint account in March 1991. (Tr. 400.) About a week after opening that account, Mrs. Hooper brought to Mrs. Tinsley's workplace a file containing legal bills and discussed with Mrs. Tinsley the amount being paid to the law firm, what was happening in the proceeding, and the forthcoming depositions. (Tr. 401-4, 484.) Mrs. Tinsley has not been involved in deciding how much would be offered in connection with settlement efforts, and has not met on her own with the other applicants about settlement, but has been kept abreast of what is going on in settlement talks. (Tr. 444, 714-15.)

52. On March 12, 1991, at Mrs. Hooper's request, Mr. Hooper took her to meet Nell McMahan, the owner of H/T's proposed transmitter site. (LBC Ex. 9; Tr. 566-67, 669-70.) Mrs. Hooper wanted to put the site option in the names of the new partners. (Tr. 702, 725.) Mrs. Hooper asked her husband to take her because it is not customary in Union, Mississippi, to go to someone's house without an introduction (Tr. 566-67), and Mrs. Hooper did not know how to get to the site at that time (Tr. 723-24).

53. Mrs. Hooper entered into a new option agreement with McMahan at this time. The agreement took the form of a letter, dated March 12, 1991, addressed to Mrs. Hooper and Mrs. Tinsley, signed by McMahan. The letter contained two lines preceded by the word "Signed." Mrs. Hooper signed on the top line and Mr. Hooper signed on the bottom line. (LBC Ex. 9; Tr. 568.) Although Mr. Hooper's signature appeared on a line preceded by the word "Signed," Mr. Hooper claimed that he signed as a witness because money had changed hands. (Tr. 568-69, 626.) Mr. Hooper helped Mrs. Hooper draw up this document on their home computer because Mrs. Hooper was under time pressure to get it done. (Tr. 569.) Mr. Hooper stated he made a mistake when drafting this agreement; he should have used the word "Witness" instead of "Signed" where his signature appeared. (Tr. 629.) Mrs. Tinsley was not involved in this matter, and has never met McMahan, the site owner. (Tr. 426, 444.)

54. In January 1991, Mr. Hooper met with Timothy Z. Barber, one of the other applicants, in Newton, Mississippi, which is about 25 miles from Mr. Hooper's office. (Tr. 591-92, 595.) Mr. Hooper had never met Barber face to face before this meeting. (Tr. 592, 596.) The two had spoken in the past by telephone about Mr. Hooper buying advertising time on the station where Barber worked. (Tr. 593, 596.) The meeting lasted about one hour. (Tr. 595.) Neither Mrs. Hooper nor Mrs. Tinsley attended the meeting. (Tr. 593.) Mrs. Hooper knew from Mr. Hooper that the meeting was to be held and considered it a "fishing expedition." (Tr. 683-84, 714.)

55. During the meeting, Mr. Hooper and Barber discussed radio, different law firms, and whether Barber's application was being backed by the radio station he worked for. (Tr. 593.) Mr. Hooper was curious as to why Barber was staying in the proceeding if he could not possibly win on a comparative basis. (Tr. 594.) Barber told Mr. Hooper that he wished he could get out of this deal, but no dollar figures were discussed. (Tr. 596-97.) Mr. Hooper reported the substance of the meeting to Mrs. Hooper and told her that Barber was interested in being bought out. (Tr. 684.)

56. In April 1991, either on the way to their depositions or on the way back, Mr. Hooper reviewed and discussed the station's proposed budget with Mrs. Hooper and Mrs. Tinsley. (Tr. 583-84, 738.) This was the first time the budget was discussed with Mrs. Tinsley. (Tr. 432.) Prior to these discussions, Mrs. Hooper had a general idea of the total construction and operation costs, but this was the first discussion she had as to the specific breakdown of these costs. (Tr. 730-31, 736-38.) At this time, Mrs. Hooper and Mrs. Tinsley discussed Mrs. Tinsley's proposed salary. (Tr. 415-16, 730-31.) Mrs. Hooper told Mrs. Tinsley about the depositions two days before their occurrence (Tr. 351-52.)

57. About a week before the June 1991 hearing in this proceeding,[4] Mrs. Hooper called Mrs. Tinsley to tell her they had an appointment to meet Charles Young, the

banker. Mrs. Hooper told Mrs. Tinsley that it was necessary to meet with Young for the purpose of identifying themselves so that he would know who they were and the reason for their being there. Mrs. Hooper and Mrs. Tinsley did meet with Young on that occasion and discussed the general terms of the proposed bank loan. (Tr. 399-400, 712.) Prior to this time, only Mr. Hooper had met with Young in connection with the application. (Tr. 606-7.) Mrs. Tinsley understood that this meeting was held so she and Mrs. Hooper could represent to the FCC that they had met the banker. (Tr. 463.)

58. *Diversification.* Other than the instant application, neither Mrs. Hooper nor Mrs. Tinsley has any interest in, connection with, or application to acquire any media of mass communications. (H/T Ex. 2, p. 4, and Ex. 3, p. 3.)

59. *Auxiliary Power.* H/T will install auxiliary power generating equipment to ensure the proposed station's continued operation in the event of any emergency condition causing an interruption in the normal supply of electrical power. (H/T Ex. 4, p. 2.)

Lady Bug Broadcasting Company, Inc.

60. *Structure and Integration.* LBC is a corporation organized and existing under the laws of the State of Mississippi. LBC has only one class of stock. All of the issued and outstanding shares are owned by Dorothy Torgerson. (LBC Ex. 1.)

61. Upon grant of the LBC application, Torgerson will be fully integrated into the day-to-day management and operation of the station as General Manager. She will work a minimum of 40 hours per week and will be ultimately responsible for implementation of the station's programming, financial and personnel policies. She will hire, fire and supervise all other management-level employees of the station. (LBC Ex. 2, p. 1.) She will also write and record spots, write letters, sell advertising, answer phones and act as the receptionist. (Tr. 818-19.) Torgerson is not employed; she is retired. (LBC Ex. 2, p. 1; Tr. 794-95).

62. Torgerson currently resides in Meridian, Mississippi, within the proposed station's 60 dbu contour. She has lived in Meridian since 1968. (LBC Ex. 2, p. 1.) All of Meridian is within the proposed station's service area. (LBC Application, at Exhibit E, Figure 7; request for official notice granted.) If the LBC application is granted, in addition to maintaining her current residence, she will maintain a residence within the station's 70 dbu contour. (LBC Ex. 2, p. 1.)

63. Approximately 10 years ago, Torgerson served as a Board Member of the Meridian Little Theatre and was a Member of its Guild. (LBC Ex. 2 as revised by *Order*, FCC 91M-2234, released July 22, 1991; Tr. 743.) From approximately 1980 to 1987, Torgerson was a volunteer Heart Fund Worker. (LBC Ex. 2 as revised; Tr. 744.) This volunteer work was performed in association with a station she then owned, and consisted of door-to-door fundraising. (Tr. 744.) Torgerson is currently a member of the Navy League, but is not an officer thereof. (LBC Ex. 2 as revised; Tr. 743.)

64. From September 14, 1968, to February 2, 1987, Torgerson served as the Business Manager of station WQIC-AM, Meridian, Mississippi. On February 4, 1969, a Certificate of Incorporation was filed for Torgerson Broadcasting Company, Inc., showing Torgerson as a Director of the corporation. She was named Secretary/Treasurer on February 21, 1969, and held that position until February 2, 1987. On June 11, 1976, Torgerson obtained a 49 percent ownership interest in station WQIC-AM. (LBC Ex. 2 as revised.) Torgerson's husband, Stan, was the co-owner of the station. (Tr. 751.)

65. In February 1987, Torgerson Broadcasting Company, Inc., sold WQIC-AM to Torgerson's son, Larry. (Tr. 750.) She and her husband took back a note from their son for the sale. (Tr. 788.) The station then became WMDN-AM. (H/T Ex. 5.) After the sale Torgerson remained at the station from February 1987 to February 1990 as an unpaid employee and acted as its Business Manager. (H/T Ex. 5; Tr. 750, 791.) From March 1987 to February 1990, she was also the Business Manager of the other station in which her son then had an ownership interest, WQIC-FM. (H/T Ex. 5.) Although she was an unpaid employee, she performed the same duties as she had before the station was sold. These duties included billing, posting and collecting accounts receivable, ordering supplies, paying all station bills, handling payroll for both stations and walk-in sales. (H/T Ex. 5; Tr. 781-86.) She also wrote, produced and served as talent on commercials and public service announcements, and handled public service scheduling. (H/T Ex. 5.)

66. *Diversification.* Other than the instant application, Torgerson does not have any interest in any medium of mass communications or any application therefor. (LBC Ex. 1 and Ex. 2, p. 1.)

67. LBC's application contained a divestiture commitment whereby Larry Torgerson committed to divest his radio stations before LBC commenced program tests. (Tr. 801-2.) When asked why the divestiture commitment was made, Torgerson explained that it was because Larry owed them money at the time, and she and her husband were getting interest payments on the purchase of the AM station. (Tr. 802-3.)

68. *Auxiliary Power.* LBC will install auxiliary power generators at its studio and transmitter sites in order to ensure continuous operation of its proposed station in the event of a power failure. (LBC Ex. 3.)

Basic Qualification Issues

Issue 3 -- Ex Parte Issue Against Thomas

69. Thomas' application was filed on April 24, 1989. Shortly thereafter, notice of the filing was published in the Union newspaper, and Union area residents began asking Thomas about the progress of the application. They also volunteered to write letters supporting her application and asked whether she had contacted Mississippi elected representatives in Washington. (Thomas Exhibit 2, p. 1.) The mayor of Union, the former mayor, board members of the Union Chamber of Commerce and the editor of the Union newspaper were among those who asked whether she had contacted the Mississippi Congressional delegation for assistance. (Tr. 311-12.)

70. Thomas has been employed as the executive director of the Union Chamber of Commerce since 1985. (Thomas Ex. 1, p. 4.) In her work she has contacted Mississippi elected officials and their staffs on a number of occasions and has asked them to contact other government agencies to assist Union and local businesses. In addition, these gentlemen and their staffs had often offered assistance to

her in the event she or the Chamber of Commerce needed help in Washington. (Thomas Ex. 2, pp. 2-3; Tr. 229-40, 292-301.)

71. In the year preceding her initial testimony, Thomas had contacted Senators Trent Lott and Thad Cochran and Representative Gillespie V. Montgomery about four times each, and had also contacted state officials. (Tr. 230-31.) She contacts them from time to time to discuss legislative matters, to extend invitations to functions, and to request that they visit Union or speak at functions. (Tr. 229.) In her office, Thomas maintains a list of the addresses and telephone numbers of elected officials. (Tr. 231.)

72. Thomas gave an example of her contacts with Mississippi's elected representatives by describing the assistance she received from Senator Lott in resolving an immigration problem that could have had adverse consequences for the Union economy. The manager of a new facility in Union was a Canadian who was in Union working on a short-term visa. The visa was revoked and Thomas turned to Senator Lott's office for help. She wanted them to "walk it through." Senator Lott intervened and the manager was soon back on the job. (Tr. 232, 234-37.)

73. In May 1989 Thomas attended a social function in Union which was also attended by Eileen Gordon, a Union resident who works as a staff assistant to Senator Lott in his Jackson office. Gordon asked whether Thomas had heard anything about the radio station and, when Thomas replied in the negative, Gordon responded that Senator Lott could help her because the FCC was part of the federal government. (Thomas Ex. 1, p. 1; Tr. 261.) Prior to this meeting Thomas had contacts with Gordon for assistance on matters involving the Chamber of Commerce. (Tr. 297.)

74. At this time, Thomas did not think she needed any help from Senator Lott because her attorney was Wayne Dowdy, a former Congressman from Mississippi, and Dowdy would know how to handle matters. (Tr. 261-62.) In addition, Thomas felt such contacts were "tacky" and distasteful; she did not like the idea of politics interfering with the merits of a contest. (Tr. 252-53, 273, 276.) Although she did not think such contacts were wrong, unlawful, or improper, and felt that constituents had the privilege to contact their legislators (Tr. 253, 256, 273), Thomas never made any attempt to determine whether it was legal or appropriate to contact elected officials in the context of a Commission proceeding (Tr. 262).

75. In August 1989, Dowdy telephoned Thomas and said that Gene Sisk, the engineer who had assisted Thomas in preparing her application, had called him (Dowdy) and said that "the Hoopers" were intent on getting the Union station and were willing to spend a large amount of money to get it. Dowdy suggested that Thomas might want to consider entering into a partnership with the Hoopers rather than continue to prosecute her own application, because a hearing could be very expensive. (Thomas Ex. 2, p. 1; Tr. 248, 320, 323.)

76. Thomas considered the information and advice relayed to her by Dowdy for many weeks. (Thomas Ex. 2, p. 2; Tr. 248.) On the one hand she wanted the station very much, but on the other hand she was worried that she could not afford to get into a spending contest with the Hoopers. She had never filed an application with the FCC before and had never worked at a radio station. Thus, she did not know very much about the FCC and feared that ultimately the applicant with the most money might prevail in a hearing. (Thomas Ex. 2, p. 2.)

77. On October 26, 1989, Thomas spoke with Dwight Long, a close friend, and confided to him her fears that the Hoopers had contacted legislators. (Thomas Ex. 2, p. 2; Tr. 243-44.) Long urged her to contact her Mississippi congressional representatives because he was of the opinion that the Hoopers had probably already done so. (Thomas Ex. 2, p. 2; Tr. 241-44; 306.) In earlier conversations with Long, which had taken place even before Thomas decided to file her application, Long told her that Shirley Hooper was going to file an application for the Union channel. (Tr. 251, 306-7.) Shirley Hooper is Long's wife's first cousin, and is the mother-in-law of Mary Hooper, a partner in H/T. (Tr. 244-45, 319.) Long had told Thomas that Shirley Hooper visited his business looking for a transmitter site and had informed her that Shirley Hooper had covered every base except contact with a local Indian tribe. (Tr. 244-46, 251, 306.) The postman who delivered mail to Thomas' office had also told her that Shirley Hooper contacted his relatives about the availability of some land for a transmitter site. (Tr. 251.) Throughout 1989 Thomas believed "very strongly" that Shirley Hooper had an interest in the H/T application. (Tr. 250.) Although Thomas scanned the H/T application in the public file, and knew that Shirley Hooper was not named in that application, she continued to believe that Shirley had an interest in H/T. (Tr. 303-4, 307-9.)

78. Following her October 26 conversation with Long, Thomas was angry. (Tr. 241, 253.) She was also insecure and felt that the Hoopers had contacted Mississippi representatives in Washington about their application and might have gained an advantage over her. (Tr. 256-57.) She wanted to put her application on an equal footing. (Tr. 242, 256, 272.) Therefore, she immediately wrote letters to United States Senators Trent Lott and Thad Cochran and Representative Gillespie V. Montgomery, all of Mississippi. (Thomas Ex. 2, p. 2.) The three letters were identical except for the names of the addressees, and were written on Union Chamber of Commerce stationery. Each letter was dated October 26, 1989, and read as follows (Thomas Ex. 2, p. 2, and Att. A):

> On April 21, 1989, my application (along with 4 others) was entered with the Federal Communications Commission in Washington to construct a new FM broadcast facility in Union. I would appreciate your endorsement of my being granted this license, as:
>
> 1. I live and work in the community, and am the only applicant who is local.
>
> 2. I am a female (widowed).
>
> 3. I am actively and morally committed to community life in the Union area.
>
> 4. I will continue to live and work here and promote progress and growth.
>
> 5. I have no other media or broadcasting interests.
>
> Based on FCC criteria, I feel I should be the applicant to be granted this license. My FCC application reference is:

Number 890424MC

Kate F. Thomas
Route 2, Box 232
Union, Mississippi 39365

Your help shall be greatly appreciated.

Sincerely,

[Signature]

Kate F. Thomas

/kft

79. On October 30, 1989, Senator Lott wrote a letter to the Chairman of the Commission, enclosing a copy of Thomas' letter, and stating as follows (Thomas Ex. 2, Att. B, p. 1):

> I am writing with respect to the enclosed constituent inquiry which is very important to me.
>
> The enclosures detail my constituent's concern and should be self-explanatory. I sincerely would appreciate your looking into the situation in a way that will provide every possible assistance. Should you have any questions about these materials, please feel free to contact my constituent directly for any additional information that you or your staff might need.
>
> I would like to respond in a very personal way, and would greatly appreciate your providing me with information that would be helpful. Finally, it would be very helpful in my handling of the matter, if you could refer specifically to this constituent by name.
>
> Again, I truly appreciate your time and attention to this for me.
>
> With kind regards and very best wishes, I am
>
> Sincerely yours,
> [Signature]
> Trent Lott

80. On October 31, 1989, Representative Montgomery wrote a letter to the Commission's Director of Legislative Affairs, enclosing a copy of Thomas' letter and stating as follows (Thomas Ex. 2, Att. B, p. 2):

> Enclosed is a letter I have received from my friend and constituent, Ms. Kate F. Thomas, Union, Mississippi, in which she has advised of her FCC application to construct a new FCC broadcast facility in Union, Mississippi.
>
> I certainly want to do what I can in an effort to be of assistance to Ms. Thomas and I will appreciate it very much if every consideration might be accorded her application. I will appreciate it also if I might be kept advised as to the status of the matter at my Laurel District Office, P.O. Box 412, Laurel, MS 39441.
>
> Sincerely,
>
> [Signature]
>
> GILLESPIE V. MONTGOMERY
> Member of Congress

81. Senator Cochran also wrote the Commission and forwarded Thomas' letter, but Thomas could not locate a copy of Senator Cochran's letter. (Thomas Ex. 2, p. 2.) All three legislators wrote Thomas in October or November of 1989 acknowledging receipt of her letters and indicating a desire to assist her. (Thomas Ex. 2, Att. C.)

82. On November 20, 1989, the Office of the Commission's Managing Director sent letters of response to Senator Lott and Representative Montgomery stating that Thomas' application was in "restricted" status under the Commission's *ex parte* rules, that copies of their letters were being disclosed to all other applicants in this proceeding and were being made a part of the public file associated with the Union proceeding. (Thomas Ex. 5, pp. 1-3.) On November 21, 1989, the Chief of the Mass Media Bureau wrote Senator Cochran acknowledging receipt of a letter from the Senator forwarding Thomas' letter, and advising that since the proceedings on Thomas' application were restricted, comment on the merits was prohibited by the *ex parte* rules. (Thomas Ex. 2, Att. D.)

83. Thomas first learned that the letters violated the Commission's rules in January 1990 when Dowdy sent her a copy of a Petition to Dismiss filed by LBC. Shortly thereafter, Thomas retained Washington communications counsel to advise her on matters related to the Commission's rules. (Thomas Ex. 2, p. 3; Tr. 224-27.) She proposes to seek counsel's advice concerning compliance with all Commission regulations and policies if her application is granted. (Thomas Ex. 2, p. 3.)

84. At the hearing Thomas acknowledged that in writing the letters she was soliciting the help of her elected representatives. (Tr. 272.) She did this because she thought the Hoopers had sought such assistance and wanted to be on an equal footing with them. (Tr. 242-43, 256.) She stated that she had acted in anger and passion after hearing from Long that the Hoopers had made similar contacts, and was ashamed of herself for following his bad advice. (Tr. 241, 249-50, 252-53, 313.) Thomas regretted her actions and represented that she will make every effort to comply with all Commission regulatory requirements in the future. (Thomas Ex. 2, p. 3.)

Issue 4 -- Thomas' Financial Qualifications

85. Thomas signed her application on April 21, 1989, certifying that "sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." Below the certification, the following was typed: "SEE ATTACHED BANK LETTER OF CREDIT." A letter to her from the Citizens Bank of Philadelphia, Mississippi, dated April 21, 1989, was also filed with the application. It provided as follows:

> Please accept this letter as our acknowledgment of our agreement for a line of credit for you in the amount of $150,000. This will be subject to review annually beginning in April, 1990. This line of credit is to be used specifically for the construction and operation of a new FM Radio Station in Union, MS.

(Thomas Ex. 6, p. 1.)

86. Before filing her application, Thomas had never had any interest in or other association with a radio station and had never filed a similar application. For this reason, she relied on her local attorney, Wayne Dowdy, and her engineer, Eugene Sisk, for advice in preparing her application. Dowdy was a former U.S. Representative from the State of Mississippi, and was the owner of several radio stations. Dowdy recommended Sisk as an engineer who had prepared the engineering sections of many applications and who had worked for Dowdy's stations. Thomas first spoke with Sisk on April 1, 1989, and during that conversation told her that he owned two Mississippi radio stations and had experience in constructing other stations. She asked him if he could construct her proposed station and he replied that he had people who worked with him and that they would construct a station and put it on the air for her. (Thomas Ex. 6, pp. 1-2.)

87. Thomas spoke with Sisk several additional times before her application was completed. According to Thomas, during one of those conversations she questioned Sisk concerning the financial certification contained in the application form, specifically asking him how much it would cost to construct her proposed station. Thomas stated that Sisk told her he would construct the station so that it was ready to go on the air for a total cost of $150,000. (Thomas Ex. 6, p. 2.)[5] Thomas did not discuss with Sisk the information he used to prepare a cost projection. (Tr. 280.) Sisk also instructed Thomas to obtain a "letter of credit" from a bank to file with the application, but did not indicate what the letter should contain.[6] Following Sisk's instructions, she requested and obtained the above-quoted letter from the Citizens Bank of Philadelphia, Mississippi. (Thomas Ex. 6, p. 2.) Thomas met with the banker for about 5 or 10 minutes before the bank opened to the public, and returned to pick up the letter about an hour later when it was ready. (Tr. 286-88.) The wording of the letter was supplied by the president of the bank. (Thomas Ex. 6, p. 2.)

88. Thomas completed the application at a meeting with Dowdy, during which she asked him what he thought it would cost to operate her proposed station. He responded that, based on his experience in operating small town radio stations in Mississippi and other southern states, Thomas could probably operate her station for about $10,000 per month if she was careful and used part-time employees. He specifically suggested that she use students from a nearby college as part-time employees. Dowdy did not give Thomas any breakdown of these operating costs. (Thomas Ex. 6, pp. 2-4.) Nor did Thomas and Dowdy discuss items such as insurance (Tr. 913), salaries for the sales manager and program director (Tr. 906-7), programming (Tr. 907), promotional costs (Tr. 913), or the number of employees the station would have (Tr. 908-12). At this time, Thomas had no idea how many part-time students she would use (Tr. 906), had not discussed with anyone at the local colleges the availability of students (Tr. 915, 927), and had no idea how much the students would make, other than minimum wage (Tr. 915).

89. Based on the advice she received from Dowdy and Sisk, Thomas estimated that she could construct and operate her station for three months for about $180,000 and that, allowing for contingencies, the total cost would not exceed $200,000. (Thomas Ex. 6, p. 3.)

90. The week before filing her application, Thomas purchased a building at 305 Main Street in downtown Union with the idea that the two apartments in the building could be converted to use as a studio for her proposed station if her application was granted. Also, before filing her application, Thomas had entered into an option to lease her transmitter site from the owner for $300 per year. Dowdy had told her that certain costs would be associated with the filing and prosecution of the application, including fees to be paid to the FCC and to a Washington, D.C., lawyer if the application was designated for hearing. While she did not have an estimate of the total costs of such fees, Thomas assumed that they would be paid as they were incurred, rather than when her station was constructed. To date, Thomas has paid all such costs on a current basis and proposes to continue to do so. (Thomas Ex. 6, pp. 4-5.)

91. Thomas claimed that both in 1989 and currently, she proposed to use her cash assets to construct and operate her station. In the event those assets proved to be insufficient, Thomas contended that she proposed to borrow additional funds, pledging her real estate as collateral. (Thomas Ex. 6, pp. 3, 7; Tr. 932-33.) Although Thomas did not plan to collect a salary from the station when she made her financial certification in 1989, and had planned to resign from her current employment, she did not give any thought as to how she would support herself if she used almost all of her cash assets to construct and operate her station. (Tr. 909, 913, 932-34.)

92. On the relevant dates in 1989 and 1991, Thomas had on deposit in Mississippi banks the following funds, which were comprised of a checking account, money funds, and certificates of deposit (Thomas Ex. 6, Att. B, pp. 1, 4):

	April 1989	August 1991
Newton County Bank	$ 50,472.25	$ 37,053.49
National Bank of Commerce	18,553.60	22,388.74
Eastover Bank for Savings	56,681.07	27,516.74
The Citizens Bank	99,324.58	114,675.19
Total	$225,031.50	$201,634.16

93. On April 21, 1989, Thomas owned real estate, including her personal residence. In August 1991, Thomas had appraisals of these properties prepared. As of August 1991, the appraised value of her residence was $87,500 and the appraised value of the other properties she owned in April 1989 totalled $244,000. (Thomas Ex. 6, Att. A, pp.

4-6 and Att. C.) No appraisals of these properties were performed in 1989, and Thomas did not speak to anyone in 1989 about mortgaging her property. (Tr. 915). There are no mortgages or other liens outstanding on any of these properties. (Thomas Ex. 6, p. 3; Tr. 897-98.) The only liability Thomas would have had in April 1989 consisted of contingent taxes which would have been due had she sold her real estate on that date. (Thomas Ex. 6, Att. A, pp. 4, 6.) In August 1991, the appraised value of this property, plus an additional acquisition, was $381,500. (Thomas Ex. 6, Att. A, pp. 4-5 and Att. C.)

94. Following the designation of the financial qualifications issue, and after she was unable to get confirmation from Sisk of construction cost estimates, Thomas retained Russell W. Robinson to assist her in determining the cost of constructing the station and operating it for three months. Robinson is a teacher at Mississippi College in Clinton, Mississippi, the general manager of Station WHJT in Clinton, and has acted as a consultant in planning the construction and initial operation of three radio stations. Station WHJT operates as a commercial station and uses students extensively in its operations. (Thomas Ex. 6, p. 4, and Ex. 7, p. 1; Tr. 866-67.)

95. In early January 1992, Robinson asked Robert Buie of Broadcast Equipment Sales and Engineering, Inc. ("BES"), of Jackson, Mississippi, to prepare an estimate of the costs of acquiring and installing all of the equipment necessary for Thomas to begin operations of her new station, including complete testing and a proof of performance for submission to the FCC. Robinson had worked with Buie and BES in the past. They constructed three new FM radio stations at his request after providing quotations similar to the one he obtained for Thomas. Based on this experience, Robinson affirmed that BES will provide a "turnkey" radio station ready to begin regular commercial operation at the total price listed in the quotation. As indicated in the quotation, BES also provides all of the necessary custom-built tables and cabinets for the equipment in both the studio and production room. (Thomas Ex. 7, pp. 1-2).

96. BES provided a price quotation for Thomas' proposed station of $156,886.44. (Thomas Ex. 6, p. 4, and Ex. 7, Att. p. 8.) In addition, BES has estimated that Thomas will be required to pay freight charges on the equipment of about $2,650 and a 6 percent state sales tax of $9,413. Thomas understands that the costs of constructing the station have increased at least 10 percent since April 1989. (Thomas Ex. 6, p. 4.) Thomas plans to locate the studio for her station in a two-story building that she owns in the business section of Union, Mississippi. (Thomas Ex. 6, p. 4, and Ex. 7, p. 2.) That building contains two apartments, each of which has a living room, bedroom, kitchen and bath. Robinson believes these rooms would be suitable for the studios without any alteration, other than installation of the studio and production room equipment listed in the BES quotation. (Thomas Ex. 7, 2; Tr. 859-61.) Thus, based on the 1992 BES figures, Thomas estimates that the current total costs of constructing her proposed station will be $168,949.44 ($156,886.44 plus $2,650 plus $9,413).

97. Robinson also projected the costs of operating Thomas' station for three months. Based on discussions with Thomas, the current costs of operating WHJT, and his experience at other stations, Robinson estimated that the costs of operating her station without revenue for the first three months would be $29,293.48 broken down as follows: Salaries of $15,362.65 plus Other Operating Costs of $13,930.83. (Thomas Ex. 7, pp. 2-4.)

98. Salaries include those for a General Manager ($4,000),[7] a Sales Manager ($3,250), a Program Director/News Director ($4,875),[8] a Secretary/Receptionist ($2,210),[9] and four or five part-time Operators/Announcers ($1,027.65).[10] (Thomas Ex. 7, pp. 3-4; Tr. 881.) Other operating costs include payroll taxes ($1,305.83), transmitter site rental ($100), music ($2,550), telephone ($1,500), power ($3,600), office supplies/postage ($1,200), station identification announcements and jingles ($225), news service ($1,215), dues and subscriptions ($150), promotions ($885), and insurance ($1,200). (Thomas Ex. 7, pp. 3-4.)

99. Robinson did not include any cost for engineering services in his estimate of the costs for the first three months of operation because BES warrants their work for a year and will maintain the equipment during this time. During his years of teaching at Mississippi College, many of his students have graduated and entered broadcasting as a career. He is generally familiar with wage scales at Mississippi radio stations and believes that capable people could be found to work at Thomas' proposed station in the positions and at the salaries projected. (Thomas Ex. 7, p. 5.)

100. The cooperative work-study program under which students would be hired on a part-time basis is now used at WHJT. Qualifying students are permitted to enroll in this program and work up to a maximum of 15 hours per week. The employer is responsible for paying 30 percent of the wages, and the remainder is paid by the government. Robinson is confident that Thomas will be able to make arrangements with local colleges to obtain students to work at her station under a cooperative work-study program similar to that used at WHJT. (Thomas Ex. 7, pp. 5-6.) However, Robinson does not know how many students are in the corps of available students for the program (Tr. 878), does not know how much money is available for the program (Tr. 878, 880), does not know if government budget cutbacks will affect the program (Tr. 879), and is not aware of whether the money used for the cooperative program can be used for students to work in businesses not associated with a school (Tr. 883).

101. Robinson estimates that the students would need three weeks of training to be able to do the job of part-time operator/announcer at Thomas' station, and she would need to hire a consultant to train them. (Tr. 887.) If Thomas hires Robinson to train the students, he will charge her a fee. Robinson did not include such fee for training in the station's proposed budget. (Tr. 891.)

102. After she met with Robinson and shortly before the hearing in 1992, Thomas called Johnnie Griffin of the Mississippi Employment Security Commission to discuss the student work-study program. (Tr. 929, 939-40.) Based on that discussion, Thomas understands that the work-study program cannot be administered until a contract is written between the employer and the Mississippi Employment Security Commission. (Tr. 927-28.) The funds involved are federal funds administered by the state agencies. (Tr. 928.) Thomas believes that one of the qualifications for the program is the economic situation of the student. (Tr. 928.) She does not believe there is a limit to the amount of funds that are available, and she was assured that funds were available at that time. (Tr. 928-29). Thomas did not mention to Griffin the specifics of the business

she would have (Tr. 938-39) and did not discuss the fact that she was looking for the availability of students for her proposed station (Tr. 944).

Issue 5 – LBC's Financial Qualifications

103. As noted earlier, partial summary decision of Issue 5 was granted by *Memorandum Opinion and Order*, FCC 91M-3180, released October 31, 1991. Specifically, it was determined that LBC adequately demonstrated that it had reasonable assurance of the availability of a loan in the amount of $180,000 from the Bank of Meridian, Meridian, Mississippi, when it certified its financial qualifications. However, summary decision was denied with respect to that portion of Issue 5 relating to LBC's cost estimates. Consequently, the question of the adequacy of LBC's cost estimates remained for determination, and the hearing on Issue 5 was limited to that matter.

104. In certifying LBC's financial qualifications in its application, Dorothy Torgerson, LBC's sole stockholder, relied on cost estimates prepared by Paul H. Reynolds, President of AmeriMedia, Inc., of Greenville, Alabama. (Tr. 752-54; H/T Ex. 6; LBC Ex. 1.) Reynolds put the LBC application package together, and prepared the application. (Tr. 746, 752.) Torgerson and Reynolds discussed what it would cost to put a radio station on the air, and Reynolds put the figures together for her. (Tr. 753, 773.) Torgerson knew from purchasing equipment over the years about what it would cost, but needed Reynolds' input because she is not an engineer and did not know everything that had to be included. (Tr. 773-74.)

105. Reynolds' cost estimates were contained in a letter to Torgerson dated April 10, 1989. (H/T Ex. 6.) They were based upon the following assumptions: that the real property needed is all leased; that the proposed tower site is used; that some pieces of equipment are purchased new and some reconditioned; and that an outside programming service is used at least part of the broadcast day. (H/T Ex. 6, p. 1.) Torgerson did not tell Reynolds that she was going to use an outside program service. Reynolds knew that Torgerson had used such a programming service in the past, and he elected to include it in his cost estimates. (Tr. 775-76.) Nor did Torgerson and Reynolds discuss the number of employees she was going to have. (Tr. 780.)

106. In his April 10, 1989, letter, Reynolds estimated that LBC would require a total of $180,000 to construct its station and operate for three months, broken down as follows (H/T Ex. 6, p. 2):

Office and Studio	
Main Studio Equipment	$ 25,000
Production Room	20,000
Electronic News Gathering Equipment	5,000
Marti Remote Units	3,500
Office Equipment	5,000
Studio/Transmitter Link	
STL and Remote Transmitter Controls	13,000
STL Tower	1,500
Transmitter/Tower	
Tower	27,000
Transmitter	25,000
Transmitter Building	2,500
Remote Power Generator	7,500
Antenna/Transmission Line	15,000
Total Equipment Cost	$150,000
Estimated Monthly Operating Expense	10,000
x 3 months	$ 30,000

107. In August 1991, subsequent to the addition of Issue 5, Reynolds prepared two additional cost estimates for LBC. (LBC Ex. 10.) The proposals were prepared as verification that a class C2 FM broadcast facility at Union can be constructed and operated for 3 months for less than $180,000. (*Id.*, at 17.) These estimates were prepared in much more detail than Reynolds' 1989 estimates, and were premised on two program options: locally originated programming, and satellite delivered programming. (*Id.*, at pp. 1, 17.) Reynolds stated that his company was in the broadcast construction business, usually serving small market operations, and his company was presently constructing similar stations in the southeast. (*Id.*, at pp. 1-2.) He also stated that in preparing the 1991 estimates, where appropriate, he checked with suppliers, service providers and government entities (such as the Wage and Hour Board), to confirm the 1989 costs and expenses. Reynolds further stated that the 1991 projections reflect that for all items, 1991 costs are the same or higher than the 1989 costs; that the 1991 budget is not a downward revision to the 1989 costs; that in 1989 he specifically provided higher costs and expense estimates than needed to allow for inflation and unforeseeable events; and that the lower figures found in the 1991 budget reflect the cushion that was built into the 1989 projections. (LBC Ex. 11.)

108. Reynolds' 1991 estimates for the construction and operation of a station using locally originated programming were as follows (LBC Ex. 10, pp. 3-10):[11]

Equipment and Installation Costs	
Office and Studio	$ 31,268
Studio/Transmitter Link	9,450
Transmitting Facility	67,510
Freight	2,300
Construction and Installation	10,700
Miscellaneous	5,000
Total Equipment and Installation Costs	$126,228
Monthly Operating Expenses	
Administration	$ 4,322
Sales	2,450
Programming	4,434
Technical	2,631
Total Monthly Operating Expenses	$ 13,837
x 3 Months	$ 41,511
Other Expenses	
Utility Deposits	$ 850

Office Supplies and Printing	750
Reserve Operating Capital	10,661
Total Costs	$180,000

109. Reynolds' 1991 estimates using satellite delivered programming were as follows (LBC Ex. 10, pp. 11-16):[12]

Equipment and Installation Costs	
Office and Studio	$ 39,704
Studio/Transmitter Link	9,450
Transmitting Facility	67,510
Freight	2,300
Construction and Installation	10,700
Miscellaneous	5,000
Total Equipment and Installation Costs	$134,664

Monthly Operating Expenses	
Administration	$ 3,963
Sales	2,450
Programming	1,400
Technical	2,631
Total Monthly Operating Expenses	$ 10,444
x 3 Months	$ 31,332

Other Expenses	
Utility Deposits	$ 850
Office Supplies and Printing	750
Satellite Programming Company Deposits	1,300
Reserve Operating Capital	11,104
Total Costs	$180,000

CONCLUSIONS OF LAW

Basic Qualification Issues

110. Four applicants remain in this proceeding: Thomas, Barber, H/T, and LBC. Basic qualifications issues were added against Thomas and LBC. Since only basically qualified applicants are entitled to comparative consideration, *Louis Adelman*, 29 FCC 1223 (1960), *aff'd sub nom. Guinan v. FCC*, 297 F.2d 782 (D.C. Cir. 1961), these issues will be resolved before addressing the standard comparative issue.

Ex Parte Issue Against Thomas

111. This issue is resolved in favor of Thomas. The Commission's rules prohibit *ex parte* presentations, defined in pertinent part as those not served on the parties made to or from decision-making personnel in restricted proceedings. Section 1.1202(b) of the Rules. Adjudicative proceedings that involve mutually exclusive applications are restricted proceedings. Sections 1.1204(a)(1) and 1.1208(c) of the Rules. Any communications (other than status inquiries) directed to the outcome or merits of a restricted proceeding are prohibited. Sections 1.1202(a) and 1.1208(a) of the Rules. No person may solicit or encourage others to make a prohibited *ex parte* presentation. Section 1.1210 of the Rules.

112. It is indisputable that Thomas solicited prohibited *ex parte* presentations in violation of the Commission's rules. Thus, Thomas wrote to her U.S. Senators and U.S. Representative soliciting their "endorsement of [her] being granted this license . . ." Thomas outlined her qualifications and stated: "I feel I should be the applicant to be granted this license." Thomas closed her letters by stating: "Your help shall be greatly appreciated." At the time Thomas made these solicitations, this was a restricted proceeding, and her letters were not served on the other parties.

113. Although Thomas solicited *ex parte* presentations, disqualification is not warranted. In *Pepper Schultz*, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989), *rev. denied* 5 FCC Rcd 3273 (1990), the Review Board stated that where an *ex parte* violation was an isolated, single incident, and not repeated, no severe sanctions will follow. In addition, the Board stated that unfamiliarity with the Commission's *ex parte* rules mitigates the inference of a culpable intent.

114. Here, it is clear that Thomas was not familiar with the Commission's *ex parte* rules. On the contrary, she believed that communicating with her elected representatives in Washington was routine, and her belief was based on her personal experiences as well as conversations with several individuals who urged her to make such contacts. It was only after she became convinced (mistakenly) that a competing applicant had made similar contacts, that she accepted this advice and, in an angry and passionate mood and against her better judgment, wrote three identical letters on the same day to her U.S. Senators and U.S. Representative. This single, isolated, uninformed and unrepeated action by Thomas does not mandate the extreme sanction of disqualification. *See Pepper Schultz*, *supra*; *see also Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 1027-28 (Rev. Bd. 1982).[13]

Thomas' Financial Qualifications

115. This issue must be resolved against Thomas. A broadcast applicant must have reasonable assurance of having sufficient funds to construct its proposed station and operate it without revenue for three months before the applicant certifies its financial qualifications. In order to prove reasonable assurance at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds, the applicant must provide substantial and reliable evidence showing "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue." Such evidence necessarily includes something more than the self-serving, uncorroborated statements of the individual responsible for the certification that steps had been taken to secure the needed funds. *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19 (1989). Thomas has not met this test. She has failed to establish that she was financially qualified at the time she certified her application. For this reason, Thomas is not qualified to become a Commission licensee.

116. It is first concluded that Thomas did not engage in serious and reasonable efforts to ascertain predictable construction and operation costs prior to certification. Giving her the benefit of the doubt, the most Thomas did was to

ask her engineer, Gene Sisk, how much it would cost to construct her proposed station, and to ask her (then) attorney, Wayne Dowdy, how much it would cost to operate that station.[14] Both of these individuals failed to give Thomas any breakdown of their figures, discuss with Thomas the information they used to project those figures, or provide her with any documentation. Dowdy did not discuss with Thomas items such as insurance, salaries for the sales manager and program director, programming, promotional costs, or the number of employees the station would need. In addition, although Thomas planned to use local college students as part-time employees, she had no idea of the number she would use, and had not discussed with anyone at the local colleges the availability of such students.

117. In *Victorson Group, Inc.*, 6 FCC Rcd 1697, 1700 (Rev. Bd. 1991), one of the applicants, Best Broadcasting Company, L.P. ("Best"), had only a "general sense" of construction costs accompanied by some "scribblings," and had no specific information as to how any of its cost figures were actually derived. The Review Board held: "This plain failure to prove that Best's projected costs were meaningfully ascertained is, standing alone, grounds for denial of Best's application. [Citations omitted.]" The same result must obtain herein. Thomas had no more than a "general sense" of her costs, *un*accompanied by any "scribblings," and had no idea how any of her cost estimates were derived. This, standing alone, mandates the denial of Thomas' application. *Victorson, supra*.

118. Thomas contends that her cost estimates were sufficient because they were reasonable, as evidenced by LBC's cost estimates, and because the Commission stated in *Revision of Form 301*, 50 RR 2d 381, 382 (1981), that "stringent itemization" of costs is not required. These arguments are without merit. First, Thomas may not rely on LBC's showing. Issue 4 was specified to inquire into *Thomas'* efforts, and it is those that must be judged. The steps taken by another applicant are not relevant to a determination of whether *Thomas* took the proper steps or whether *Thomas* has established her financial qualifications. Second, although "stringent itemization" is no longer required, an applicant still must have *some* idea of the components of its cost estimates. Here, Thomas had no idea at all as to what was and was not included those estimates. The most she had was the "general sense" which was held in *Victorson* to be inadequate.

119. Further, having failed to establish that she engaged in serious and reasonable efforts to ascertain her costs prior to certification, Thomas may not now remedy this deficiency by submitting another proposal. *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991). Consequently, the testimony of Robinson, which constitutes a totally new proposal, may not be considered. *Id.*

120. Even assuming, *arguendo*, that Thomas' cost estimate efforts are considered to be adequate, Thomas has failed to show that, prior to certification, she had a committed source of funds to construct and operate her station. It is clear that Thomas was relying on a bank letter at the time she certified her application. Indeed, below the financial certification the following was typed: "SEE ATTACHED BANK LETTER OF CREDIT." A letter to Thomas from the Citizens Bank of Philadelphia, Mississippi, was filed with the application. However, this letter does not meet the Commission's "reasonable assurance" standards.[15] Thomas has not established that she had a long and established relationship with the bank sufficient to infer that the bank was thoroughly familiar with her assets, credit history, current business plan, and similar data. Thomas failed to show that she provided the bank with such data and that the bank was sufficiently satisfied with this financial information that a loan in the stated amount would be forthcoming. Thomas has not even established that the tentative terms and conditions of the loan, such as repayment period, interest rate, and collateral requirements, were even discussed with the bank. Under these circumstances, no "reasonable assurance" can be found. *E.g., Shawn Phalen*, 5 FCC Rcd 53 (Rev. Bd. 1990); *see also Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *aff'd* 6 FCC Rcd 1893 (1991). This too, standing alone, requires the denial of Thomas' application.

121. Thomas' claim that she was relying in 1989 on her own cash assets to fund the construction and operation of her station must be rejected. While an applicant may show that it had an alternative financing plan of relying solely on the assets of a principal, such plan must be in place "from the outset." *Opportunity Broadcasting of Shreveport*, 6 FCC Rcd 1499, 1501 (Rev. Bd. 1991). Here, Thomas' plan from the outset was to rely on a bank line of credit. Thomas voluntarily disclosed her plan in her application, while saying nothing whatsoever about using her own assets. The fact that she did obtain a line of credit, and her testimony that she did not give any thought as to how she would support herself if she used nearly all of her cash assets to construct and operate the station, further support the conclusion that her plan from the outset was to use a bank line of credit. In addition, Thomas' statement in her application that she was relying on the bank letter of credit was more probative of her intentions at the time she filed her application than was her self-serving hearing testimony, which was prepared nearly three years later. *See Aspen FM, supra*. Moreover, Thomas' hearing testimony that she was relying on her own assets was at variance with her application and is not entitled to any consideration. *Id.* at 1603. This is especially true in light of the fact that Thomas has never amended her application to substitute for the bank letter reliance on her own personal assets. *Id.*; *see also Salt City Communications, Inc.*, FCC 92R-49, released July 7, 1992, at para. 22.

LBC's Financial Qualifications

122. This issue which, as indicated earlier, was limited to the adequacy of LBC's cost estimates, is resolved in favor of that applicant. The Commission has held that an applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. *Northampton Media Associates, supra* at 5519. In *A. P. Walter, Jr.*, 6 FCC Rcd 875, 877 (Rev. Bd. 1991), the Review Board stated: "In evaluating an applicant's financial documentation, cost estimates will be credited as long as they are not 'so far below average or beyond a range of reasonableness . . . .' *Kaye - Smith Enterprises*, 98 FCC 2d 675, 677 (Rev. Bd. 1984)." LBC has met this standard.

123. Initially, it is concluded that LBC's sole stockholder, Dorothy Torgerson, made serious and reasonable efforts to ascertain construction and operation costs. Specifically, Torgerson and her consultant, Paul H. Reynolds, discussed costs and Reynolds provided Torgerson with a written breakdown of such costs in April 1989, prior to LBC's financial certification.[16] While it is true that certain cost items were omitted from the written estimate, this is not fatal. The Commission has recognized

that broadcast stations are rarely constructed and operated as originally proposed, and has determined that the stringent itemization of estimated costs is no longer required. *Revision of Form 301, supra* at 382. The breakdown given to Torgerson by Reynolds was sufficiently specific to substantially comply with the Commission's standards. To rule otherwise and to hold, in essence, that an applicant must estimate its costs with exacting precision prior to certification, would be to render the Commission's ruling in *Revision of Form 301* a virtual nullity.

124. Moreover, LBC has established through the unrebutted testimony of Reynolds[17] that a broadcast station in Union, Mississippi, such as that proposed by Torgerson, can be built for the sum originally estimated in 1989. Thus, Reynolds testified that his 1989 figures specifically included higher cost and expense estimates, and that he built into his 1989 numbers a sufficient cushion to allow for inflation and unforeseeable events. This testimony was not contradicted. In this regard, Reynolds' 1991 figures are not viewed as a "revisionist" budget, but merely as a showing that the proposed station, of whatever program format, can be built for the amount estimated in 1989, and that it was not unreasonable for Torgerson to rely on those estimates.[18] Finally, nothing has been submitted to contradict Reynolds' testimony that the station could be built for the amount specified, and no evidence was adduced to establish that the 1989 cost estimates were so far below average or beyond a range of reasonableness to mandate the conclusion that LBC could not construct and operate the station as proposed. *Kaye-Smith Enterprises, supra* at 677.

Standard Comparative Issue

125. Thomas has been disqualified and is not, therefore, entitled to comparative consideration. *Louis Adelman, supra*. Consequently, the applications of Barber, H/T, and LBC must be evaluated under the comparative issue, which is governed by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). In the policy statement, the Commission established two primary objectives toward which the process of comparison should be directed: (a) maximum diffusion of control of the media of mass communications (the diversification criterion); and (b) the best practicable service to the public (the integration criterion). *Policy Statement*, at 394. In addition, the acquisition and proposed use of auxiliary power equipment is also a factor of decisional significance in comparative AM and FM proceedings. *Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

Diversification

126. Neither Barber, H/T, nor LBC hold any attributable media interests. Therefore, diversification is not a factor in the comparative evaluation of the applicants.

Auxiliary Power

127. Since each applicant proposes to install auxiliary power equipment, none is to be preferred on this basis.

Integration

128. *Barber*. Barber is entitled to 100 percent credit for his management participation proposal. As an individual applicant, Barber will work full time, at least 40 hours per week, at his station as General Manager. In that capacity, he will have overall supervisory responsibility for all aspects of the station's operations, including oversight of the station's entertainment, news and public affairs programming, sales, budgeting, development of station policies, and the hiring, firing and supervision of station personnel.

129. Barber's proposal is enhanced by his promise to move to and reside in Union, Mississippi, if his application is granted, and by his past residence within the service area. However, his past residence occurred between 1969 and 1975, while Barber was a student between the ages of 14 and 20, and must be significantly discounted both because of its remoteness in time and Barber's youthfulness. *Eugene Walton*, 7 FCC Rcd 3237, 3239 n.8 (Rev. Bd. 1992); *Colonial Communications, Inc.*, 7 FCC Rcd 674 (1992); *Ronald Sorenson*, 7 FCC Rcd 1952 (1991).[19] Barber's civic activities from 1969 to 1975 must be similarly discounted. Further, since residence and civic activities are elements of a single local residence factor, *Ronald Sorenson, supra*, and Barber has not resided within the service area since 1975, no credit can be given for his post-1975 civic activities. Even if this were not so, no credit is warranted for Barber's activities after 1975. His involvement with the American Advertising Federation appears to be limited to the production of public service announcements, and Barber has not established that anything having to do with the Mississippi Wildlife Federation related to the proposed service area or familiarized him with the needs and interests of that area. *Ronald Sorenson, supra*.

130. Barber's proposal is also enhanced by his past broadcast experience. Barber has been employed at several radio stations from 1975 to the present. He has been an on-air announcer and board manager, has been involved in sound mixing, production, and sales, has been a Senior Account Executive, and is currently the Local Sales Manager for an AM-FM combination in Jackson, Mississippi.

131. *H / T*. H/T is entitled to 55 percent credit for the management participation proposal of Mrs. Hooper. As a 55 percent general partner, Mrs. Hooper proposes to work at least 40 hours per week as the station's General Manager. In that capacity, Mrs. Hooper will direct and oversee the day-to-day operations and management of the station, will supervise station employees, will be in charge of the station's EEO program, and will have ultimate authority for the technical operations, finances, personnel, programming, and administrative operations of the station. No credit is warranted for the management participation proposal of Mrs. Tinsley. For the reasons which follow, it is concluded that Mrs. Tinsley is not a *bona fide* general partner of H/T; at most, she is a prospective station employee.

132. In *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), the Commission held that the principle that requires applicants to establish the overall reliability of their integration proposals applies to the subsidiary question of whether the applicant's described ownership structure accurately reflects the manner in which control will be exercised. To the extent that an applicant's conduct is at odds with its purported ownership structure, the applicant has failed to meet its burden of showing that its proposal is reliable. In resolving questions of this nature, the Commission considers, among other things, whether the individuals organizing the applicant are giving away ownership in a manner that is patently unreasonable if taken at face value, and whether an assertively active principal

has exercised little, if any, significant control over the applicant and has not shown any real likelihood of doing so.[20]

133. H/T has failed to meet its burden of establishing that Mrs. Tinsley is a *bonafide* general partner. Mrs. Tinsley was recruited as a "general partner" in H/T because Mr. Hooper was told by his counsel that the partnership between him and Mrs. Hooper could not prevail in a comparative proceeding. Mr. Hooper was advised to recruit a Black female resident of Union. Under time pressure, Mr. Hooper recruited Mrs. Tinsley, after rejecting another candidate.

134. At the time Mrs. Tinsley was interviewed for, offered, and accepted the position of "general partner," she had no idea whatsoever, and did not care about, what her position, duties and responsibilities at the station would be. She had no idea whatsoever what her salary would be. Nor did she negotiate her partnership interest. On the contrary, she was told what her position at the station would be, was told what her ownership interest would be, and the Hoopers chose the partnership percentages arbitrarily. Moreover, and quite significantly, both Mrs. Hooper and Mrs. Tinsley testified that Mrs. Hooper could fire Mrs. Tinsley as the station's Sales Manager.

135. There is no evidence that Mrs. Tinsley had any significant role in the preparation of the August 17, 1989, amendment substituting the H/T partnership for the Hoopers' partnership. Although Mrs. Tinsley signed the amendment and reaffirmed the applicant's financial qualifications, it is clear that she did not know what she was doing. Indeed, Mrs. Tinsley believed she had gotten a job and was meeting with Mrs. Hooper for the purpose of completing an employment application. In addition, Mrs. Tinsley never consulted with anyone about the formal partnership agreement before signing it, and was not aware of the legal obligations of a general partner until approximately 21 months after joining the partnership.

136. Mrs. Tinsley has had virtually nothing to do with the prosecution of the H/T application and has done nothing of substance in connection with such prosecution. Nor has she been consulted in any meaningful way on any matter of significance. She has been completely dominated by Mrs. Hooper, who has made all the partnership decisions. Thus, Mrs. Tinsley had no role in securing the August 16, 1989, bank letter, and did not see the letter until approximately 21 months later, even though she was one of the addressees. Similarly, Mrs. Tinsley had no role in obtaining H/T's March 13, 1991, bank letter, or its March 12, 1991, site availability letter, even though she was an addressee of both. Mrs. Tinsley has never met the site owner.

137. Although, at Mrs. Hooper's initiative, Mrs. Tinsley and Mrs. Hooper met with the banker in June 1991, it is clear that this meeting was not substantive. It was held for the purpose of allowing the general partners to testify that they had met the banker. Moreover, Mrs. Tinsley did not know about the applicant's public notice in the newspaper until a friend told her she saw Mrs. Tinsley's name in the paper, did not know if H/T has a public file, and had no input into H/T's December 20, 1990, Integration Proposal and Diversification Statement, even though she signed it.

138. Mrs. Tinsley has a relatively miniscule financial stake in the applicant, and has not been consulted with respect to financial matters. Mr. Hooper told Mrs. Tinsley at the time he interviewed her that she would only be responsible for contributing $450 to the partnership. The most she could lose in this venture is her $450. Mrs. Tinsley never asked why she was getting 45 percent of the partnership without having to contribute more. The applicant has been financed by loans to H/T by Mrs. Hooper. Although Mrs. Hooper believes the partnership is legally obligated to repay these loans, she testified that Mrs. Tinsley will have no repayment responsibility if H/T is unsuccessful. Likewise, although Mrs. Tinsley is a 45 percent partner, she believes she would not be liable for repayment of 45 percent of these loans.

139. The applicant has a joint checking account, which was opened at Mrs. Hooper's initiative approximately 20 months after the H/T partnership was formed. During this 20 month period, no one asked Mrs. Tinsley for her $450 contribution. Mrs. Hooper keeps the checkbook and Mrs. Tinsley has never written a check on the account. Nor has Mrs. Tinsley ever seen a bank statement for this account. Although she is kept abreast of settlement efforts, Mrs. Tinsley has not been involved in deciding how much would be offered in settlement, and has never met on her own with the competing applicants to discuss settlement. The first time the budget for the station was discussed with Mrs. Tinsley was in April 1991, approximately 21 months after she entered into the partnership. This was also the first time Mrs. Tinsley's proposed salary was discussed. Mrs. Tinsley paid none of the transportation and hotel expenses incurred in connection with her appearance at the hearing.

140. From the above, the conclusion is inescapable that H/T is, in all but name, a sole proprietorship in which Mrs. Tinsley is nothing more than a nominal partner without influence or control. *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4094-95 (Rev. Bd. 1988). Mrs. Tinsley's essentially passive role and the fact that she can be fired undermine the reliability of H/T's claim that she will wield management authority. *Royce, supra*. Further, the manner in which H/T was formed is totally irreconcilable with sound business judgment. The Hoopers essentially gave away 45 percent of their application in a manner that was patently unreasonable if taken at face value. Mrs. Tinsley brought nothing to the applicant in terms of experience, services performed or to be performed, or finances which could reasonably account for the Hoopers' generosity. *Royce, supra*; *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991). It is clear that the choice of Mrs. Tinsley was not a legitimate business decision but was undertaken solely to obtain enhanced comparative credit. Consequently, integration credit for Mrs. Tinsley is not warranted. *Poughkeepsie, supra*; *Royce, supra*; *Religious, supra*; *see also Berryville Broadcasting Company*, 70 FCC 2d 1 (Rev. Bd. 1978). *Compare Lone Cypress Radio Associates, Inc.*, FCC 92R-53, released July 16, 1992, where an integration proposal was credited based upon the active participation of a general partner.[21]

141. *LBC*. LBC is entitled to 100 percent credit for its management participation proposal. As LBC's sole stockholder, Torgerson will work a minimum of 40 hours per week at the station as General Manager. In that capacity, Torgerson will be ultimately responsible for implementation of the station's programming and personnel policies, will hire, fire and supervise all other management-level station employees, will write and record spots, write letters, sell advertising, answer phones and act as receptionist.[22]

142. LBC's proposal is enhanced by Torgerson's residence within the service area since 1968, and by her promise to maintain a second residence within the 70 dbu contour of her station. However, her civic activities during the period of her past and current residence are unimpressive and not worthy of credit. *Charisma Broadcasting Corp.*, 6 FCC Rcd 3411, 3415 (Rev. Bd. 1991). Specifically, Torgerson's activities with the Meridian Little Theatre occurred at a remote point in time, and her activities with the Heart Fund consisted only of door-to-door fundraising. *Ronald Sorenson, supra*; *Naguabo Broadcasting Company*, 6 FCC Rcd 4879, 4880 (1991). Her only current civic activity is a membership in the Navy League, but Torgerson has failed to show that such organization has a presence within the service area or that her membership familiarized her with the needs and interests of that area.

143. LBC's proposal is also enhanced by Torgerson's past broadcast experience. Torgerson has served as Business Manager of several radio stations from 1968 to early 1990. Her duties included billing, posting and collecting accounts receivable, ordering supplies, paying station bills, handling payroll and public service scheduling, walk-in sales, and writing, producing and serving as talent on commercials and public service announcements.

ULTIMATE CONCLUSION

144. Both Barber and LBC have been awarded 100 percent integration credit while H/T has been awarded 55 percent integration credit. As between Barber and LBC, the qualitative enhancement factors favor LBC. Under the *Policy Statement*, *supra* at 395-96, LBC must be preferred under the local residence factor. Specifically, LBC has been credited with Torgerson's continuous service area residence since 1968 and her proposed future residence within the station's 70 dbu contour. On the other hand, Barber's credit for service area residence from 1969 to 1975 (a much shorter period of time than Torgerson's residence) has been significantly discounted, and his future residence proposal is equal to that of LBC. In addition, Torgerson's past broadcast experience is entitled to greater weight because it was of a longer duration than that of Barber and was at the managerial level for a longer period of time. *Rancho Mirage*, *supra* at 383. Consequently, the LBC application is preferred over that of Barber under the comparative issue, and a grant of the LBC application will best serve the public interest, convenience and necessity.[23]

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of Lady Bug Broadcasting Company, Inc. (File No. BPH-890424MF) for a construction permit for a new FM station on Channel 281C2 in Union, Mississippi, IS GRANTED, and the applications of Kate F. Thomas (File No. BPH-890424MC), Timothy Z. Barber d/b/a Double B Broadcasting (File No. BPH-890424MD), and Mary L. Hooper and Carolyn B. Tinsley (File No. BPH-890424ME), ARE DENIED.[24]

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

FOOTNOTES

[1] The application of Chunky Creek Radio was also designated for hearing. However, that application was dismissed for failure to prosecute by *Order*, FCC 91M-231, released January 22, 1991.

[2] Thomas filed an erratum and corrected reply findings on April 27, 1992.

[3] On December 20, 1990, H/T filed an Integration Proposal and Diversification Statement. Mrs. Tinsley had no input into this document, although she signed it. (Tr. 426-27, 465-68.)

[4] Mrs. Hooper made all of Mrs. Tinsley's travel and hotel arrangements in connection with Mrs. Tinsley's attendance at the hearing. Mrs. Tinsley paid for none of this. (Tr. 429-30.)

[5] After the financial issue was added, Thomas asked her counsel, Mr. Bernard, to contact Sisk to confirm that he had given her an estimate of $150,000 for the cost of constructing the station. Sisk, however, refused to provide the requested confirmation, stating that he did not recall doing so and that, based on his usual practice with clients, he would not have done so. (Thomas Ex. 6, p. 3; Tr. 917, 924-25; H/T Ex. 10.)

[6] Thomas testified that before she picked up the application or the engineering report from Sisk, he asked her whether she was getting a letter of credit from the bank. When Thomas responded that she was getting a letter of credit for $180,000, Sisk responded, according to Thomas: "Oh, no. You won't need that much. $150,000 is the most." (Tr. 940-41.)

[7] Thomas will serve as General Manager and will assist in local news gathering and sales. (Thomas Ex. 7, p. 3.)

[8] This individual will also serve as an announcer/operator, will tape commercials, and prepare news. (Thomas Ex. 7, p. 3.)

[9] This individual will also serve as a station operator. (Thomas Ex. 7, 3.)

[10] These individuals will be students from local colleges who will be hired on a cooperative work-study program.

[11] Each category was further broken down into its component parts except for Miscellaneous, Utility Deposits, and Office Supplies and Printing. (LBC Ex. 10, pp. 3-10.)

[12] Again, each category was further broken down into its component parts except for Miscellaneous, Utility Deposits, Office Supplies and Equipment, and Satellite Programming Company Deposits. (LBC Ex. 10, pp. 11-16.)

[13] Barber, citing *Stearns County Broadcasting Co., Inc.*, 104 FCC 2d 688 (Rev. Bd. 1986), *rev. denied* 3 FCC Rcd 2987 (1988), argues that disqualification is appropriate. However, *Stearns County* is totally distinguishable from the instant case. There, the applicant made numerous oral and written solicitations of *ex parte* assistance leading to the conclusion that the violations were willful and repeated. In addition, the *Stearns County* applicant had previously violated the *ex parte* rules in connection with a prior application, and had been expressly warned by the Commission that future violations would not be countenanced.

[14] Sisk refused to confirm giving Thomas a cost estimate, stating it was not his usual practice with clients to do so. No testimony was offered from Dowdy to confirm Thomas' testi-

mony. Nevertheless, for the purposes of this analysis, Thomas' testimony on these matters will be viewed in its most favorable light.

[15] Thomas conceded this in her Opposition to Motion to Enlarge Issues, filed on June 19, 1991, at 4.

[16] Torgerson's efforts in this regard may be contrasted with those of Thomas. Thomas had no documentation or breakdown of her costs, and her testimony was completely uncorroborated. *See Sunbelt Limited Partnership*, FCC 92R-54, released July 10, 1992. In addition, Torgerson had past broadcast experience, including the responsibility for purchasing equipment, and had a certain ability to judge the efficacy of Reynolds' 1989 proposal. Thomas had no such experience, and was not in a position to evaluate the lump-sum figures given to her by her engineer and former attorney.

[17] If the opposing parties wished to challenge Reynolds' testimony or figures, it was incumbent upon them either to request his presence for cross-examination or to present rebuttal. They did neither.

[18] Once again, Torgerson's efforts must be distinguished from those of Thomas. Thomas did not engage in serious and reasonable cost estimate efforts and never had an acceptable cost estimates proposal before her prior to certifying her financial qualifications. For this reason, Robinson's testimony was an impermissible upgrade and was not entitled to any consideration. On the other hand, Torgerson did have serious and detailed cost estimates before her when she certified LBC's financial qualifications, and Reynolds' testimony was nothing more than an attempt to establish that the original estimate was viable and reasonable.

[19] Barber's more recent regular visits to his parents' home within the service area cannot be credited because the record does not reflect the frequency or duration of such visits. *Colonial Communications*, *supra* at 675 n.2.

[20] Although *Royce* was specifically directed to the active-passive principal situation, there is no reason not to apply these pronouncements in the context of a general partnership such as H/T. The same may be said for the cases cited at paragraph 140, *infra*.

[21] In light of the conclusion that H/T is entitled to 55 percent integration credit and Barber and LBC are entitled to 100 percent credit, it is not necessary to analyze the qualitative attributes of H/T's proposal. *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989). In addition, it is not necessary to resolve questions raised by Thomas, Barber, and LBC concerning Mr. Hooper's allegedly impermissible role in H/T's activities.

[22] Barber contends that questions are raised about Torgerson's willingness and ability to implement her proposal because she is over 70 years old, is retired, traveled extensively with her husband the year preceding her testimony (1990-91), and likes golf. Barber's arguments are without merit. There is no Commission policy which presumes an individual of Torgerson's age cannot or will not fulfill an integration pledge. Age is not a barrier to the award of a construction permit. In addition, Torgerson testified that her husband, not she, wanted to retire. (Tr. 794.) Barber's remaining arguments are speculative in the extreme, and assume facts not in evidence, namely, that Torgerson's future travel and golf plans will interfere with her commitment to become fully integrated. *See Rancho Mirage Radio*, 7 FCC Rcd 480, 484-85 n.5 (Rev. Bd. 1992).

[23] Had Thomas not been disqualified, she would have been preferred over LBC on the comparative issue. Thomas would have been entitled to 100 percent credit for integration and this would have been enhanced by her long-term residence coupled with her very extensive record of civic activities in Union, Mississippi. Although LBC would receive a slight preference for her past broadcast experience, this factor is of only minor significance and would not outweigh Thomas' advantages. *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 (1991).

[24] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-634

In re Applications of

AB Partners, Ltd.	File No. BPH-881215MI
BEBE-F Broadcasting Corp.	File No. BPH-881215NE
Baker Communications Partnership	File No. BPH-881215NN

For Construction Permit for a
New FM Station on Channel 297A
(107.3 MHz) in Baker, Louisiana

Appearances

Michael R. Miller on behalf of AB Partners, Ltd.; *Richard J. Bodorff*, and *Kenneth D. Ebanks* on behalf of BEBE-F Broadcasting Corp.; *J. Richard Carr* on behalf of Baker Communications Partnership.

DECISION

Adopted: July 31, 1992; Released: August 13, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.
Board Member GREENE.

1. This proceeding involves the applications of AB Partners, Ltd. (AB), BEBE-F Broadcasting Corp. (BEBE-F), and Baker Communications Partnership (Baker) for authority to construct a new FM broadcast station at Baker, Louisiana. After a hearing which dealt only with the standard comparative issue, Administrative Law Judge (ALJ) Walter C. Miller determined that a grant of BEBE-F's application would best serve the public interest. *Initial Decision* (*I.D.*), FCC 92D-13, released February 24, 1992. Specifically, the ALJ found that BEBE-F was the only applicant to have sustained its claim to 100% integration credit, that AB's organizational structure was "a classic sham," and that Baker's principals had not shown that they could meet their integration pledges. *I.D.*, Conclusions of Law, at para. 37. The case is now before the Review Board on exceptions filed by AB and Baker, each of whom contends that its claimed integration credit should be fully restored and, in turn, that BEBE-F's credit should be reduced below 100%. None of the parties seek oral argument and, indeed, the facts of record do not ocassion the need for such argument. We have reviewed the *I.D.* in light of the exceptions and underlying record and conclude that the ALJ's grant to BEBE-F should be affirmed.

BEBE-F

2. BEBE-F is a corporation whose sole voting stockholder is Beatriz Facundus. Facundus is BEBE-F's president, secretary, sole director, and 47.06% equity owner.[1] She proposes to work full-time as BEBE-F's general manager, in which capacity she will supervise and set policy in all aspects of station operation including finances, personnel, programming, and sales. The ALJ awarded BEBE-F 100% quantitative integration credit. *I.D.*, Findings of Fact, paras. 7, 38-39, 68; Conclusions of Law, para. 16. In its exceptions, AB argues that Arthur M. Hoover, III, one of BEBE-F's non-voting stockholders, who is employed as an engineer at WAFB-TV in Baton Rouge, was active with Ms. Facundus in forming the application and would likely continue to participate with her in the operation of the station if the application is granted. Specifically, AB submits that Hoover initiated the proposal, referred legal counsel and a consulting engineer to BEBE-F, arranged for an equipment proposal to be prepared on Facundus' behalf, and introduced her to BEBE-F's prospective site owner and participated in a meeting with him. Asserting that Hoover owns a 29.41% equity interest in BEBE-F, AB argues that the applicant should be awarded no more than 70% integration credit. Br. at 24-25. For its part, Baker echoes AB's exceptions and argues that Hoover, as well as John F. White, a former non-voting stockholder, were active in the application process after the time BEBE-F established its two-tier corporate structure and, as such, must be deemed to have attributable ownership interests for integration purposes. Br. at 18-20. We reject these exceptions.

3. In determining whether an applicant's ownership structure accurately reflects the manner in which control will be exercised, the Commission has said that where the "applicant's conduct or intentions are demonstrably at odds with the described ownership structure," the proposal will be deemed to be unreliable. *Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1700 (1992); *Royce International Broadcasting*, 5 FCC Rcd 7063, 7063-64 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991). The Commission generally looks first to the post-formation record as the best evidence of who will control the applicant; if that record is inconclu-

[1] At the time of the "B" cut-off date, BEBE-F's stock ownership was as follows:

Stockholder	Stock Held
Beatriz Facundus	25 shares of voting stock
Arthur M. Hoover, III	25 shares of non-voting stock
Grey Hammett	15 shares of non-voting stock
John Barton	5 shares of non-voting stock
John F. White	15 shares of non-voting stock
Melvin Lee Holden	15 shares of non-voting stock

Thereafter, Holden sold his stock back to the corporation on February 13, 1991, which proportionately increased the equity interests of the remaining stockholders, and White sold his shares to Facundus on April 22, 1991, which increased her equity interest. *I.D.*, Findings of Fact, paras. 7, 38, & n.5; BEBE-F Exh. 1.

sive, the Commission will examine the entire record of the principals' pre and post-formation activities. *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5560 (1991).

4. In this case, most of the activities of BEBE-F's nonvoting stockholders relied upon by its opponents to discredit its proposal occurred prior to the time BEBE-F formally organized as a corporation; and, even if given full consideration, do not establish that control was in the hands of anyone other than its voting stockholder, Ms. Facundus. The record shows that although Ms. Facundus was introduced to the project by Mr. Hoover, she assumed control of the application at her first meeting with him and at the first organizational meeting of the stockholders and has alone made the significant corporate decisions since that time. Ms. Facundus testified that at their first meeting:

> I told Mr. Hoover that if I was going to be involved in any matter, I was going to be investing my own money because I liked to be able to run things and unless you have the money, you cannot be the boss.
>
> * * *
>
> I did make a point to him from my point -- for myself, that if I was going to be involved, I was going to put money and I was going to be controlling it; otherwise, I didn't want it. I don't need another investment.

Tr. 439-440

Mr. Hoover testified:

> Q. At that meeting, did you explain to her what you had learned about what was involved in preparing an application?
>
> A. During the meeting, Ms. Facundus asked questions about what I knew, about what I had learned. She wanted to know primarily what her liabilities would be in pursuing this. She also said that any time she got involved in the business, she would want to be in control of it.
>
> * * *
>
> Q. Did you discuss with her what would be involved in preparing an application?
>
> A. I really didn't know. Most of my engineering is repair type work.... At that point, I had never seen application.

Tr. 550-551.

> Q. At what point did it become her project that she was in control of?
>
> A. The very first time we met, she said that whenever she gets involved in a business, if she gets involved in a business, it is something that she had to have control over.

Tr. 562.

5. At the first organizational meeting of the prospective investors, which Ms. Facundus called at her home in November 1988, she testified:

> Q. Was there a discussion about the structure of an applicant at this meeting with all of these participants?
>
> A. I told them, first of all, who I was, what I had done in business, how long I had been in the city, how I perceived the business and how the business was going to be structured if I was going to have anything to do with it.

Tr. 445-446. At that meeting, Mr. White testified that Ms. Facundus:

> A. [D]id about 99% of the talking and we did the listening, so it wasn't very much exchange going on.
>
> Q. And -- and what was she talking about?
>
> A. Talking about what her ideas were to -- what she wanted to do, to run a station... This is something she'd always wanted to do, gave us her background and why she thought she would do a good job with it and said that she wanted to be the general partner, and it would be her baby to run and would be interested in making an investment on that basis and, basically, that was about it but, obviously, a lot more elaborate.

Tr. 407-408. Gary Hammett, another non-voting stockholder, confirmed that at that first meeting:

> Basically, she laid it on the line that if we were going to invest in this, she was going to run it, she was going to keep very accurate books because she would be calling for money at any time. The capital calls did come quick, and she expected her money very quickly.

Tr. 528.

6. The record further establishes that, in addition to deciding upon BEBE-F's organizational structure, drafting the application, initiating all capital calls, and paying her *pro rata* share of the expenses, (BEBE-F Exh. 1), Ms. Facundus, also selected its legal counsel and engineering consultant, negotiated the applicant's transmitter site agreement and financial arrangements, and directed the purchase of the stock interests of former non-voting stockholders White and Melvin Lee Holden; the evidence also shows that non-voting stockholders Hoover and White played no significant role in any of these actions. Thus, with respect to the retention of professional help, Hoover gave Facundus the names of a communications attorney and a consulting engineer of his acquaintance, whereupon

she checked the backgrounds of the people he'd mentioned, after which she spoke with and retained them. Tr. 442-443, 446-447, 471, 551-552, 554, 561. Hoover also introduced Facundus to the owner of the site ultimately selected for BEBE-F's transmitter, and Facundus then negotiated the site agreement terms with the owner. Tr. 571-572. Similarly, Facundus asked Hoover to obtain from a supplier an equipment cost proposal for her, after which she prepared a budget for the station prior to her financial certification. Tr. 468-470. As for Mr. White, he accompanied her to the Sunburst Bank to introduce her to the bank president, whom he knew personally, whereupon she negotiated the applicant's bank loan letter. Tr. 416-417, 461-462. Finally, contrary to Baker's allegations, Hoover's contact with the equipment supplier on Facundus' behalf and his accompaniment of her to meet the site owner, which events occurred subsequent to the first organizational meeting of the investors but prior to BEBE-F's formal incorporation on December 15, 1988 (*see* BEBE-F Exh. 1), were not post-organizational activities; only White's introduction of her to the Sunburst banker occurred later and this was not in itself a significant action on White's part because he played no part in obtaining the loan. *See Royce International Broadcasting*, 5 FCC Rcd at 7064 (passive owner may not actively participate after the applicant has "formally organized" itself); *Great Lakes Broadcasting, Inc.*, 7 FCC Rcd 1829, 1830 (Rev. Bd. 1992)(where activities of passive owners occurred prior to filing of articles of incorporation, their interests were not attributed). In sum, we find that BEBE-F is entitled to full integration credit. *See Lone Cypress Radio Associates , Inc.*, FCC 92R-53, released July 16, 1992, para. 9 (full credit awarded where active principal was introduced to the project by a non-owner former broadcaster, and active principal did not retain the attorney or engineer, or obtain the transmitter site, but was familiar with these details, and assisted in creating the partnership agreement and drafting the application).

7. BEBE-F also offers superior qualitative enhancements over its opponents, even assuming, *arguendo*, that their exceptions were granted and they were fully restored to 100% credit. In terms of the unified factor of local residence and civic participation, *see Ronald Sorenson*, 6 FCC Rcd 1952 (1991), *recon. dismissed*, 6 FCC Rcd 6901 (1991), Ms. Facundus has very long term and continuous service area residence since 1962 (except for a brief period from February 1971 to December 1972), and has an extensive history of civic activities dating back to 1963 in many organizations including leadership roles. These activities include membership on the Southern University College of Business Advisory Council, where she develops educational programs for business school; member and founder of Unlimited Resources, an educational association of women; founder and Board Member of Friends of the Centroplex Theatre for the Performing Arts; founder of the Baton Rouge Opera; President of the Baton Rouge Symphony League; and member of such organizations as the Greater Baton Rouge Chamber of Commerce, the Capital Area United Way, the American Cancer Society, in addition to many church and political activities. Ms. Facundus' proposal is also enhanced by her Hispanic status. *I.D.*, Findings of Fact, paras. 69, 71-72.

8. By contrast, AB, whose general partner and 30% equity owner, Charles Alexander, proposes to serve full time as general manager, *id.* at paras. 6, 63, is qualitatively below BEBE-F's proposal. Although AB receives credit equal to BEBE-F for the Black minority status of Alexander, its proposal is far inferior to that of BEBE-F on the equally important unified factor of local residence and civic participation. Alexander offers no current local residence, but only past residence from 1975 to 1979, when he attended college in Baton Rouge. He proposes future local residence. *Id.* at para. 64. Because of its remoteness in time, his past residence is of little current value in providing area familiarity, *see Ruth Payne Carmen*, 1 FCC Rcd 46 (Rev. Bd. 1986), and BEBE-F is clearly superior in residence credit. This advantage is further enhanced by Ms. Facundus' civic participation record which dwarfs Mr. Alexander's record of participating in two fund-raising activities since 1982. *I.D.*, Findings of Fact, para. 66. Thus, the local residence/civic participation combined factor overwhelmingly favors BEBE-F as the applicant whose attributes "indicat[e] a knowledge of and interest in the welfare of the community." *Ronald Sorenson*, 6 FCC Rcd at 1953; *see Opportunity Broadcasting of Shreveport*, 7 FCC Rcd 3382, 3383 (Rev. Bd. 1992). In addition, BEBE-F receives a slight coverage preference over AB for its 16% overall population advantage, as found by the ALJ and not excepted to by AB. *See I.D.*, Findings of Fact, paras. 61-62; Conclusions of Law, para. 10. Thus, BEBE-F readily prevails over AB.

9. Baker, a general partnership, proposes to integrate Albert G. Carson IV, its 50% owner, and Lucille M. Hall, its 45% owner, full time, and Charles R. Hall, Sr., its 5% owner, part time, 25 hours a week. Each of these principals has long-term local or service area residence, *see I.D.*, Findings of Fact, paras. 8, 74, 77, 83, 98, which is even longer than that offered by Ms. Facundus. Because the integrated principals of both applicants have lived in the area for a very long time, the differences in duration provide only a marginal plus in Baker's favor. *See Beach Broadcasting Ltd. Partnership*, 6 FCC Rcd 4485 (1991). Baker's principals have also been civically active. Carson was President and Board Member of the Baker Little Theatre, and has been a member of such organizations as the Baker Jaycees, the Baker Rotary Club, the Baker Chamber of Commerce, and has engaged in fund-raising activities with other organizations. Lucille Hall has also worked with the Rotary Club and Chamber of Commerce and engaged in fundraising for the Baker Century Club. Charles Hall has been active in the Rotary Club and Chamber of Commerce. *I.D.*, Findings of Fact, paras. 79, 88, 100-102. These activities are not quite as extensive or varied as those of Ms. Facundus, who may therefore have a slight advantage in this area for her many years of continuous civic involvement in leadership and other positions. On balance, both applicants are well-enhanced for their residence and civic activities backgrounds, and whatever comparative preference would be awarded under this factor would not be large. *See Scottsdale Talking Machine and Wireless Co., In c.*, 6 FCC Rcd 7539, 7542 (Rev. Bd. 1991), *rev. denied*, FCC 92-302, released July 13, 1992. Baker also seeks broadcast experience credit apparently based on Carson's ownership of and work with a video production firm since 1986 (*see I.D.*, Findings of Fact, para. 60), but this experience would only result in a "minor or slight" credit. *See Policy Statement, supra*, 1 FCC 2d at 396; *Joe L. Aldridge*, 6 FCC Rcd 994, 996 (Rev. Bd. 1991). As such, it is significantly outweighed by the 100% minority preference awarded BEBE-F for Facundus' status. Even if Baker were deemed to have a small advantage for combined residence and civic activities, this credit does not equal or outweigh the clear and substantial pref-

erence due BEBE-F for its minority ownership. *See Lorraine Walker Arms*, 6 FCC Rcd 5586, 5588 (Rev. Bd. 1991). Finally, Baker was awarded a very slight coverage advantage over BEBE-F for 8% greater coverage to well-served areas. *I.D.*, Conclusions of Law, para. 10. This marginal advantage, *see Beach Broadcasting Ltd. Partnership*, 6 FCC Rcd at 4485, cannot outweigh the overall integration preference awarded BEBE-F. *See National Communications Industries*, 6 FCC Rcd 1978, 1982 (Rev. Bd. 1991); *Eugene Walton*, 6 FCC Rcd 6071, 6078 (Rev. Bd. 1991)(subsequent history omitted). In sum, BEBE-F is the comparatively superior applicant over Baker as well.[2]

10. ACCORDINGLY, IT IS ORDERED, That the application of BEBE-F Broadcasting Corp. (File No. BPH-881215NE) for a construction permit for a new FM station at Baker, Louisiana IS GRANTED, and the applications of AB Partners, Ltd. (File No. BPH-881215MI), and Baker Communications Partnership (File No. BPH-881215NN) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[2] Because we have found BEBE-F to be entitled to full integration credit and to be the superior comparative applicant overall, we do not need to reach the exceptions of AB and Baker to the ALJ's refusal to award them any integration credit. "An agency, like a court, need not decide questions which are not relevant to its decision." *Deep South Broadcastging Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960); *Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991); *Rebecca L. Boedker*, 6 FCC Rcd 2557, 2559 n. 2 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-226

In re Applications of

SALTAIRE COMMUNICATIONS, INC.	File No. BPH-880229NG
CHARLES S. FITCH, P. E.	File No. BPH-880301NW
WHSL CORPORATION	File No. BPH-880301OF

For Construction Permit for
New FM Station, Channel 299A,
Pawcatuck, Connecticut

Appearances

Kathryn R. Schmeltzer, Esq., and *John K. Hane III , Esq.*, on behalf of SaltAire Communications, Inc.; *Charles S. Fitch, pro se*, on behalf of Charles S. Fitch, P. E.; and *J. Richard Carr, Esq.*, on behalf of WHSL Corporation.

DECISION

Adopted: August 3, 1992; Released: August 13, 1992

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Joseph Chachkin (ALJ), 7 FCC Rcd 1404 (1992), which granted the construction permit application of WHSL Corporation (WHSL) for a new FM station at Pawcatuck, Connecticut, and denied the competing applications of SaltAire Communications, Inc. (SaltAire) and Charles S. Fitch, P. E. (Fitch). SaltAire and Fitch filed exceptions.[1] Replies were filed by WHSL and SaltAire.

2. The *Hearing Designation Order*, 5 FCC Rcd 3260 (Mass Media Bur. 1990) (*HDO*), released in this proceeding consolidated the applicants before us for hearing on the standard comparative issue, which is governed by the criteria set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *HDO* further permitted evidence on the applicants' respective coverage proposals to determine whether a coverage preference should accrue to any of the applicants. Thereafter, the ALJ added a real party-in-interest issue against WHSL based on the evidence adduced at hearing. *Memorandum Opinion and Order*, FCC 91M-667, released February 19, 1991. No additional evidence was taken on the real party-in-interest issue.

3. In his *Initial Decision*, the ALJ resolved the real party-in-interest issue in favor of WHSL. He then selected WHSL as the comparatively preferred applicant because of its superior enhancements under the integration criterion. WHSL was awarded 100% quantitative credit; and its enhancements included minority and female ownership[2] and long-term service area residence. *Initial Decision* at para. 68. SaltAire and Fitch also received 100% quantitative integration credit, but SaltAire's enhancements consisted of shorter-term service area residence and civic activities, 50% female ownership,[3] and 50% past broadcast experience. *Id.* at paras. 65, 68. Fitch ran a "distant third" because his enhancements consisted only of past broadcast experience and a proposal to move to the service area. *Id.*[4] The ALJ also awarded SaltAire a very slight coverage preference, because it would serve a 35% larger population than would be served by WHSL, but held that the integration preference given WHSL "clearly outweigh[ed]" the coverage preference awarded SaltAire. *Id.* at para. 71.[5]

4. SaltAire's exceptions mainly challenge the quantitative integration credit awarded WHSL, characterizing it as a "new breed of sham."[6] Alternatively, SaltAire contends that the ALJ erred in failing to diminish WHSL's quantitative integration credit because that applicant's passive investors actively participated in the preparation and subsequent prosecution of the application. SaltAire further argues that the ALJ erred in failing to resolve the real party issue against WHSL. Fitch does not except to the ALJ's conclusion that he is in third place comparatively, but objects to the ALJ's failure to add a site availability issue against SaltAire. We have reviewed the *Initial Decision* in light of the exceptions and reply briefs and our examination of the record. The ALJ's findings of fact and conclusions of law in the *Initial Decision* are adopted, except as modified herein, but we reverse certain of his conclusions on the standard comparative issue and conclude that a grant of SaltAire's application would best serve the public interest. We need not reach SaltAire's other exceptions since they are not of decisional significance. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296 para. 3 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992).

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[1] SaltAire's exceptions contained a request for oral argument. We will deny the request because it appears that argument here would not materially assist in the resolution of the case. The Board forgoes oral argument where it would not lend valuable assistance in resolving the issues before it. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1990).

[2] Following the release of the *Initial Decision*, the court held in *Jerome Thomas Lamprecht v. FCC*, 958 F.2d 383 (D.C. Cir. 1992), that the Commission's sex-based preference policy violates the Fifth Amendment. Thus, the gender preference awarded WHSL will be stricken.

[3] SaltAire's gender enhancement is also stricken. *See* n.2.

[4] All of the applicants also proposed the installation of auxiliary power equipment.

[5] Fitch will serve an even smaller population. The entire area to be served by the Pawcatuck applicants already receives eleven other aural services.

[6] The Commission has discouraged the use of the term "sham" because of the term's ambiguity and potential for confusion. The Commission stated that it is more appropriate to analyze integration proposals under a comparative issue in terms of their overall reliability. *See Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1700, para. 16 (1992).

EXCEPTIONS

5. WHSL is a Connecticut corporation comprised of one shareholder, Catherine M. Hamilton. *Initial Decision* at para. 26. The ALJ awarded WHSL 100% quantitative integration credit predicated on Hamilton's proposal to serve as the facility's full-time general manager. *Id.* at paras. 49, 67. SaltAire contends, however, that WHSL is not entitled to any quantitative credit because that applicant's purportedly passive investors have exercised, and will continue to exercise, control over the applicant. Specifically, SaltAire charges that WHSL devised an extraordinary financial arrangement in the form of participating notes, as an alternative to nonvoting stock, so that its "passive" investors, John Spicer, Aubrey Hamilton -- father of Catherine Hamilton --, and Jay Levin, can claim that they have no ownership interests in the applicant and thus avert attribution of their beneficial interests. SaltAire argues that the participating notes are simply "disguised equity" and should not be treated differently than the interests of limited partners or nonvoting shareholders for purposes of testing integration proposals. It adverts to the legal services provided to WHSL by Levin's law firm, including discussions with communications counsel, as well as various tasks carried out by Aubrey Hamilton as the type of involvement that would lead to attribution of their interests if they had nonvoting stock or limited partnership interests. Moreover, SaltAire asserts that Catherine Hamilton's role has generally been passive, permitting the investors, for example, to make the decision to use the participating notes. Finally, it conjectures that the noteholders are intended ultimately to have nonvoting stock, adverting to WHSL's certificate of incorporation, which includes two classes of stock; the participating notes themselves, which refer to holders of preferred stock; and WHSL's Biennial Report filed in January 1990, or nearly two years after the application was filed, which listed Aubrey Hamilton as an officer of WHSL and Spicer and Levin as directors.

6. The undisputed facts are as follows. In January 1988, John Spicer, a local businessman,[7] learned of the availability of the Pawcatuck FM channel from an advertisement placed in a local newspaper by a broadcast consulting company. *Initial Decision* at para. 27. He contacted the company, obtained the pertinent information, and then telephoned Aubrey Hamilton to see if Hamilton's daughter, Catherine, would be interested in running a broadcast facility. *Id.* at para. 27-28. Spicer and Hamilton are longtime friends and have previously considered investing in a common entrepreneurial venture. *Id.* at para. 27. Spicer and Hamilton agreed that this might be a good investment and that Jay Levin, a prominent attorney and friend of theirs, should join them for purposes of providing general legal guidance. *Id.* at para. 28. Hamilton discussed the idea with his daughter, who agreed to head up such a project. *Id.* at para. 30. Catherine Hamilton then contacted the consulting company, received a packet of information sent by them, and retained their services, which included the additional services of both a consulting engineer and communications counsel. *Id.* at para. 31.

7. In early February, the four individuals met at Levin's law offices to discuss forming an applicant controlled by Catherine Hamilton and the financing of such a project. *Id.* at para. 32. Levin suggested they adopt a traditional corporate form. *Id.* at para. 33. Each agreed that Catherine Hamilton would be the 100% voting stockholder and that Aubrey Hamilton, Spicer, and Levin would be nonvoting stockholders and directors. *Id.* Each would have a twenty-five percent equity interest. *Id.* Ms. Hamilton would not be required to contribute any capital to the corporation, receiving her twenty-five percent ownership for her proposed services. Tr. 356, 783. It was left to Levin and his firm to handle the formalities as the corporation's local counsel. *Initial Decision* at para. 33. Following the meeting, Levin asked another attorney at his firm, Joseph Selinger, to prepare the applicant's incorporation and serve as the corporation's secretary. *Id.* at para. 35. Selinger's legal services were intended to be Levin's contributions to the applicant. Tr. 418-419. Selinger drafted the corporate documents, as instructed by Levin, listing Levin, Spicer, and Aubrey Hamilton as nonvoting stockholders and Levin and Spicer as directors. Tr. 484-485. He then circulated the draft documents, providing a copy to communications counsel, and filed the incorporating papers with the state. Tr. 484-486. The certificate of incorporation provided for both voting stock and nonvoting preferred stock. Tr. 486.

8. After the corporate documents were distributed but shortly before the application was filed, Selinger learned from talking with communications counsel that listing the proposed nonvoting shareholders as officers and directors "would elevate them to a status, or perhaps suggest involvement that was not their intent to have." Tr. 493. He therefore came up with the concept of using participating notes to provide a "potential solution that would accomplish their economic objectives, and at the same time try to make it unequivocally clear that Ms. Hamilton was going to be in control." Tr. 496-497. The notes, in effect, obviated the necessity for nonvoting stockholders, ostensibly making Spicer, Levin, and Aubrey Hamilton "creditors" only, but allowing each of them to receive twenty-five percent of the station's earnings. Selinger discussed the idea of the participating notes with communications counsel and Levin. *Id.* He stated that he "probably" also spoke with Catherine Hamilton to describe his concerns. *Id.* Ms. Hamilton testified at first that she had no participation or input in the notes, but subsequently stated that she had seen the twenty-five percent interests in assets and earnings accorded each investor by the notes, and saw no problem with them. Tr. 317, 320, 322. Selinger conceded that the notes were a mechanism to "retain the same equity split and, again unequivocally put Ms. Hamilton in control of the corporation." Tr. 497, 521.

9. Selinger asserted that the original voting/nonvoting corporate documents were never finalized, and that the corporation's biennial report for 1990, referred to above by SaltAire, listing Aubrey Hamilton as an officer and Spicer and Levin as directors, was an error. Tr. 492, 501, 502. He stated that it had been prepared by a paralegal and not carefully reviewed by himself. Tr. 501-502. He said a correction was subsequently sent to the state.[8] Tr. 503. The

[7] Following the hearing, Spicer died on April 30, 1991. *Initial Decision* at n. 7.

[8] Selinger reported the error after a motion to enlarge issues had been filed by SaltAire on July 12, 1990 regarding the matter. Tr. 503-505.

notes, themselves, were executed on March 21, 1988, nearly three weeks after WHSL filed its application. SaltAire Exhs. 16a, 17a, and 18a. A letter signed jointly by the noteholders on the same day provided: "that if the corporation cannot arrange financing from a bank or other financing institution without additional collateral, we shall jointly and severally guarantee that financing and/or subordinate and modify our Participating Notes as necessary in order to obtain the financing and satisfy all required loan conditions." SaltAire Exh. 19a. On its face, the promise expired on December 31, 1988.[9] Ms. Hamilton testified that the preparation of the participating notes had not been completed before the filing of the application. When she filed, Levin and Spicer had agreed orally they would provide financial support for the station, but no dollar amount had been agreed upon, and Ms. Hamilton therefore relied on her father's net liquid assets to certify that WHSL was financially qualified. Tr. 193-194, 200, 202. The participating notes have not superceded the applicant's reliance on her father's assets. Tr. 354. She stated, however, that she was glad to have the notes signed, because she does not "have to wipe [her] father out completely" if additional funds are needed. Tr. 334. Ms. Hamilton acknowledged that there are no corporate records showing the amount of funds that have already been loaned to WHSL by the investors. Tr. 394-395.[10]

10. Essentially, each of the participating notes provides that, for $4,000 contributed by the noteholder, WHSL must pay a base interest of six percent per year, plus "additional interest and contingent interest." The "additional interest," also due yearly, is defined as twenty-five percent of the available earnings of the corporation. SaltAire Exh. 18a. Available earnings are defined as "net earnings of the Corporation... plus (1) any non-cash expenses or deductions, such as amortization or depreciation, and (2) interest deductions on any debt, bond or "other security that is subordinate to this Note used in computing net earnings."*Id.* at 2-3. In the event of the sale of assets through dissolution, liquidation or winding up the corporation, each noteholder receives contingent interest in the amount of twenty-five percent of the value of the assets of the corporation after repayment of the unpaid balance of the note and accrued interest. *Id.* at 3. The notes cannot be prepaid and they do not contain any provision for paying the principal $4,000, other than when the company is sold or dissolved. *Id.* at 2, 3. The notes explicitly provide that, except where the noteholders' consent is required, the entire voting power of WHSL is vested in the sole voting stockholder and that they have no right to vote or any voice in the management or operation of WHSL. *Id* at 3. However, Section (d) of the notes provides that, except with the consent of the holders of at least two-thirds in amount of the outstanding participating notes, given in person or by proxy at a meeting of the stockholders, WHSL cannot, *inter alia:* (1) amend or repeal any provision of the Certificate of Incorporation if such action would alter the preferences or special rights of the participating notes so as to affect them adversely; (2) issue, authorize, or create, or increase the authorized amount of, any stock, security, debt or obligation having preferential rights to the earnings or assets; (3) by voluntary action dissolve, liquidate, or wind up WHSL or sell, mortgage, pledge, lease, or convey all or substantially all of the assets of WHSL; or (4) effect the merger or consolidation of WHSL. *Id.* at 3-4.[11] Section (d) can only be amended, repealed, or added to by consent of holders of three-fourths in the amount of the notes given in person or by proxy at a shareholders meeting. *Id.* at 5.

DISCUSSION

11. In *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991), the Commission set forth a comprehensive statement of the principles governing when integration proposals are to be credited. Applicants that establish the overall reliability of their integration proposals will receive credit. Conversely, "where an applicant has failed to demonstrate reliably that its nominally controlling principals will exercise control or has otherwise left a fundamental uncertainty about the true nature of its organizational structure," no credit will be awarded. 5 FCC Rcd at 7064 para. 10. *Royce* forewarns that control of an applicant will be fatally uncertain where (1) a principal holding a small or passive interest (rather than the supposedly active owner) is in a position to dominate the applicant's affairs; or (2) a person with no disclosed ownership interest (again, rather than the supposedly active owner) is in a position to exercise significant control over the applicant. *Id.*

12. In the case before us, we agree with SaltAire that WHSL has not established the overall reliability of its active principal's integration proposal. The record establishes that, for nominal $4,000 loans to the applicant, Spicer, Levin, and Aubrey Hamilton acquired in virtual perpetuity the right to seventy-five percent of the net earnings and assets of the applicant, while simultaneously retaining control over Ms. Hamilton's ability to repay their loans, borrow money from other sources, issue new stock, or even settle the case. As a practical matter, as asserted by SaltAire, WHSL is powerless to sell authorized stock to raise capital without the noteholders' consent, and Ms. Hamilton cannot borrow money elsewhere because the noteholders' rights over the earnings and assets leave only her share available as security and to cover amortization, depreciation, and interest payments on any debt subordinate to the notes. WHSL cannot escape from the onerous

[9] Spicer testified that the commitment was still in effect, however, and that the December 31, 1988 expiration date was chosen because none of the participants knew how long the proceeding would take. Tr. 733-734. But the noteholders had not actually agreed to an indefinite extension of the expiration date, Tr. 466-467, and according to Ms. Hamilton, "no one has made any mention of extending this agreement because we have just been waiting." Tr. 326.

[10] Ms. Hamilton also acknowledged that she procrastinated until August 1990, or nearly twenty-nine months after the application was filed, before setting up a corporate bank account. Tr. 257-260.

[11] Additionally, consent is necessary to authorize or create any stock, security, debt, or obligation convertible into prior preference securities; increase the authorized amount of or issue any stock, security, debt, or obligation having rights to available earnings or to the assets of the corporation on dissolution, liquidation, or winding up, which are on parity with those of the participating notes; or reclassify stock that may be created having equal or preferential rights to available earnings or to assets of the corporation on dissolution, liquidation, or winding up, that are on a parity with those of the participating notes. SaltAire Exh. 18a.

provisions of the notes without the consent of the noteholders because the principal cannot otherwise be paid unless the assets are substantially sold or the company dissolved[12] -- which Ms. Hamilton also cannot do voluntarily without the consent of the noteholders, even if she can repay the principal and base interest. Although WHSL counters in its reply brief that part of the consideration of the participating notes was a commitment on the part of each of the three individuals to guarantee financing up to $275,000 if outside funding was not forthcoming without additional collateral, this "consideration" is governed by the noteholders' March 21, 1988 letter, which expired by its terms on December 31, 1988, and has not been renewed. But, even if the letter were to be renewed at some future time, it gives the noteholders the option to guarantee the financing jointly or severally or modify the notes so that WHSL could obtain bank financing. As Selinger testified, Ms. Hamilton cannot go out and get a bank loan without the consent of two-thirds of the noteholders, Tr. 514, even for WHSL's initial financing.

13. We agree with WHSL that the notes do not make the noteholders "owners" in that they are not stockholders in the corporation. But, the record shows that the notes are intended as a mechanism to "[r]etain the same equity split" the noteholders initially intended to have as stockholders, Tr. 497, and "seemed to be consistent with, again, what [Selinger's] understanding was of their intent in forming the corporation, that they would each be twenty-five percent participants or equity holders." Tr. 521. Catherine Hamilton, who had no input in the note terms, Tr. 317, 320-22, seemed to equate the twenty-five percent interest each noteholder retained with the original equity intent, *see* Tr. 320-21, and was very confused about "the whole process" concerning WHSL's finances.[13]

14. The record shows that the noteholders viewed WHSL as an investment more akin to equity than credit. Upon learning they could not manage their investment as directors if WHSL were to get full integration credit for Catherine Hamilton's participation, they substituted the participating notes.[14] For principal totaling the relatively nominal amount of $12,000 at the time the notes were made and the mere possibility of a larger financial role, the noteholders gave themselves the power to make significant management decisions about how WHSL handles its financial arrangements and, through this mechanism, have put themselves in the position of overseeing the applicant. Although creditor relationships do not ordinarily intimate control of an applicant, *see Morris, Pierce & Pierce*, 88 FCC 2d 713, 717 (Rev. Bd. 1981), *review denied*, FCC 83-31, released January 25, 1983, the control retained here by the noteholders in the guise of a creditor relationship is inconsistent with the exclusive managerial control the Commission expects of active owners claiming integration credit.[15] The noteholders have not shown as clear an intent to wield their financial control like a "bludgeon" as did the applicant's father in *Shawn Phalen*, 7 FCC Rcd 623 (Rev. Bd. 1992), but they have clearly reserved for themselves the right to pull WHSL's management strings through financial control that goes beyond the protection of their invested principal. *See generally Evergreen Broadcasting Co .*, 6 FCC Rcd 5599, 5601-5602 paras. 13-18 (1991) (credit denied where non-owners with marital, social, and business ties remained in position to exercise significant control over applicant); *Progressive Communications, Inc.*, 5 FCC Rcd 7058 (1990) (credit denied where principal ostensibly withdrew as an owner but continued to be significantly involved in the applicant's affairs) (subsequent history omitted). On the record here, we are constrained to find that control of WHSL is fatally uncertain under the *Royce* standard. WHSL's integration claim cannot be credited.

15. In light of the foregoing, coupled with SaltAire's unchallenged 100% quantitative integration credit and very slight coverage preference, and the absence of exceptions to Fitch's lower comparative ranking, we will grant SaltAire's application. *See* 47 CFR § 1.277(a) ("any objection not saved by exception ... is waived").[16]

16. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed April 1, 1992 by SaltAire Communications, Inc. IS GRANTED, and the amendment

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[12] WHSL has argued that Attorney Joseph Selinger testified that Connecticut law automatically provides the ability to retire the notes. Brief at 6. Selinger's testimony does not support WHSL's assertion. He testified that he believed there was no prohibition in the notes against prepayment. In that case, he testified, a note could be prepaid under Connecticut law. Tr. 518. Each participating notes explicitly provides, however: "This Note shall not and cannot be prepaid." SaltAire Exh. 18a at 2. Thus, the argument that the notes can be prepaid by operation of state law is unsupported by the record, and we must evaluate the notes by their own terms.

[13] Indeed, she seemed confused about what interest the noteholders actually held or how contributions above the initial $4,000 apiece would be handled. Tr. 359-63. She also did not keep records of amounts paid out on behalf of WHSL or amounts contributed to WHSL. Tr. 394, 395. She expected Selinger's office to keep corporate records, including financial records, and tell her what she needed to do. Tr. 395-97. Legal services, including Selinger's services, were Levin's contribution. Tr. 418-419. When the applicant needed money, her father sometimes asked Spicer for it. Tr. 394.

[14] Had WHSL left the original corporate structure in place, the significant and continuing legal services comprising Levin's "capital contribution," and the participation of Spicer, Levin, and Aubrey Hamilton as directors and officers, would have contravened the "no material involvement" safeguards applicable to claimed passive owners. *See Magdalene Gunden Partnership*, 6 FCC Rcd 5976 (1991); *Doylan Forney*, 3 FCC Rcd 6330, 6335-6336 (1988)(subsequent history omitted). We note also that the ostensibly passive investors met at Levin's law offices long after the application was filed to discuss the status of the case. Tr. 524-525.

[15] *Cf. National Communications Industries*, 7 FCC Rcd 1703, 1704 para. 6 (1992)(Commission looks for exclusive managerial control); *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1434 para. 14 (1992) (same).

[16] Fitch argues in his exceptions that the "Commission erred in its decision not to dismiss SaltAire completely due to a lack of site assurance and engineering issues..." Exceptions at 8. Apparently, he is referring to two *Memorandum Opinions and Orders* (FCC 91M-599, released February 14, 1991, and FCC 91M-1382, released April 19, 1991) issued by the ALJ denying Fitch's petition and supplement for a site availability issue against SaltAire. Fitch has presented no basis for disturbing the ALJ's rulings. Fitch also contends that the death of John Spicer adversely affects SaltAire's financial qualifications because Spicer was a director of the bank on which SaltAire was relying for its finances. However, Fitch's exceptions specifically note that Spicer had recused himself from participating in SaltAire's loan. Thus, we will deny this exception as speculative since Fitch failed to submit any support for his contention. *See* 47 CFR § 1.229 (d).

IS ACCEPTED; and that the motion to strike filed April 2, 1992 by SaltAire Communications, Inc. IS DENIED; and

17. IT IS FURTHER ORDERED, That the application of SaltAire Communications, Inc. (File No. BPH-880229NG) for authority to construct a new FM station on Channel 299A at Pawcatuck, Connecticut IS GRANTED; and that the applications of Charles S. Fitch, P. E. (File No. BPH-880301NW) and WHSL Corporation (File No. BPH-880301OF) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

GE AMERICAN COMMUNICATIONS, INC. File Nos. 10-DSS-MP/ML-92
11-DSS-EXT-92

For Orbital Reassignment and for Modification of Authorization to Construct and Launch the Satcom H-1 Domestic Fixed-Satellite

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1992; Released: August 11, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. GE American Communications, Inc. (GE Americom) requests an extension of time in which to complete construction of and launch its Satcom H-1 domestic fixed-satellite. It further requests authority to locate Satcom H-1 at 85^0 W.L. GTE Spacenet Corporation (GTE Spacenet) filed comments, to which GE Americom replied. For the reasons set forth below, GE Americom's requests are granted.

II. BACKGROUND

2. In 1988, GE Americom was authorized to construct, launch and operate a hybrid 4/6 GHz and 12/14 GHz domestic fixed-satellite, Satcom H-1, at the 79^0 W.L. orbital location.[1] GE Americom now proposes to use Satcom H-1 as replacement capacity for its Satcom K-1 (Ku-band) and Satcom II-R (C-band) satellites, located at 85^0 W.L. and 72^0 W.L., respectively.[2] The company now proposes to relinquish its 79^0 W.L. orbital location and to locate its new hybrid at 85^0 W.L., a location which it contends will afford better coverage of the United States[3] AT&T's Telstar 302 C-band satellite, which reaches end-of-life in 1994, is currently located at 85^0 W.L. GE Americom asserts that AT&T will replace Telstar 302 with its new Telstar 402 hybrid, to be located at 89^0 W.L.[4] Thus, the petitioner states, 85^0 W.L. will be available as a suitable hybrid location.

3. In light of its decision to use Satcom H-1 as a replacement satellite, GE Americom requests an extension of its completion of construction and launch milestone commitments to coincide with the end-of-life of its existing Ku-band satellite at 85^0 W.L.[5] Specifically, GE Americom proposes to complete construction of Satcom H-1 in January 1996 and to launch it in March 1996.[6] The company has already met its commencement of construction milestone commitment.[7]

4. GE Americom alleges that grant of its request for orbital reassignment is consistent with the public interest because the 85^0 W.L. orbital position will better meet its customers' demands for 50 state coverage; will allow it to be more competitive with other operators in the provision of 50 state service, thereby enhancing competition in the domestic satellite industry; and will be wholly consistent with the company's "renewal expectancy" at the 85^0 W.L. location. Further, GE Americom argues that grant of its request for extensions of time in which to complete construction of and launch Satcom H-1 is consistent with the policies underlying our milestone requirements, and will allow the company to take advantage of the latest technical advances in the design of its satellite.[8]

5. GTE Spacenet does not oppose the Request for Reassignment at this time, nor does it comment on the related request for extensions of time. It notes, however, that GE Americom has indicated that the design for Satcom H-1 has not been finalized. Consequently, GTE Spacenet states that it reserves the right to oppose Satcom H-1's reassignment to 85^0 W.L. should the satellite's final design cause significant interference problems into its adjacent Spacenet III satellite. In its Reply to GTE Spacenet, GE Americom confirms its responsibility and intent to build and operate Satcom H-1 in conformance with the Commission's 2^0 spacing and coordination requirements.

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[1] GE American Communications, Inc., 3 FCC Rcd 6984 (1988) (Satcom H-1 Authorization Order); Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988)*on reconsideration*, 5 FCC Rcd 179 (1990) (1988 Orbit Assignment Order).

[2] Satcom K-1 was launched in 1986 and reaches the end of its expected life in 1996. Satcom II-R, launched in 1983, is expected to reach the end of its service life in 1995. GE Americom has not previously requested replacement of either satellite.

[3] GE Americom states that, while coverage of all fifty states is not possible from the 85^0 W.L. location, it will be sufficient to cover all but certain portions of Alaska. Application for Reassignment at p. 4.

[4] *Id.* at n.2.

[5] While Satcom II-R capacity is expected to reach its end-of-service life in 1995, prior to the proposed launch of Satcom H-1, GE Americom plans to provide interim C-band capacity on another of the company's satellites to accommodate existing users until the launch of Satcom H-1.

[6] Currently, Satcom H-1 is to be constructed by May 1993 and launched by August 1993. Satcom H-1 Authorization Order at para. 8.

[7] In October 1990, GE Americom signed a non-contingent contract with GE Astro Space Division for the construction of Satcom H-1. Such a noncontingent contract has been found to satisfy the commencement of construction milestone. *See, e.g.*, Letter from Chief, Domestic Facilities Division to Hughes Communications Galaxy, Inc. (June 7, 1990).

[8] Although more innovative technology may be available to the applicant if its milestone deadlines are extended, a decision to wait for the development of superior technology is a business concern within the applicant's control and will not, standing alone, support a request for extension of milestone commitments. *See, e.g.*, National Exchange Satellite, Inc., 7 FCC Rcd 1990, 1991 (Com.Car.Bur. 1992)

III. DISCUSSION

A. Request for Orbital Reassignment

6. Grant of GE Americom's request for orbital reassignment will serve the public interest, convenience and necessity. Relocation to 85^0 W.L. will permit GE Americom to meet its customers' needs and may promote greater competition in the 50-state satellite communications market. In addition, such reassignment will not result in the loss of available orbital locations: 79^0 W.L. will be immediately available for assignment to a qualified applicant.[9] Finally, we have no reason to believe that Satcom H-1 can not be successfully coordinated with adjacent satellites.

B. Request for Milestone Extensions

7. As part of its plan to use Satcom H-1 as a replacement for two of its existing single-band satellites, GE Americom requests an extension of its required launch date to coincide with the end-of-life of its in-orbit Ku-band satellite, Satcom K1, located at 85^0 W.L. Although extensions of milestone deadlines are generally granted only in situations where the delay is caused by circumstances beyond the applicant's control,[10] grant of GE Americom's request, in this situation, will not run afoul of the principles underlying our milestone requirements and will further the public interest.[11]

8. The milestone schedules, which are included in the authorization of every space station, are designed to insure that Commission licensees are proceeding with the implementation of their systems. Requiring licensees to propose and to keep realistic milestone commitments prevents them from holding orbital locations while they examine whether, when and how to proceed with their plans. Such "warehousing" may frustrate the public interest in the earliest availability of satellite services by preventing other qualified entities from providing services more expeditiously[12] Because it already has the authority to use the Ku-band position at 85^0 W.L. through 1996, the only orbital location that GE Americom could arguably be "warehousing" is the C-band portion of that location. In the meantime, the previously-assigned orbital location of 79^0 W.L. will become available for either a hybrid satellite or C- and Ku- single-band satellites; thus, the orbital reassignment will actually result in the net gain of an immediately available Kuband orbital location. Accordingly, GE Americom will not be tying up any orbital location to the disadvantage of other satellite operators or the public. Further, we have no reason to believe that GE Americom will not implement its system in conformance with its new milestones. The company has already entered into a noncontingent contract for the construction of Satcom H-1 and has an existing customer base that will require follow-on capacity in the near future.[13]

9. Moreover, the public interest will be served by grant of GE Americom's request. Existing customers of the company will be assured of timely and sufficient replacement capacity at an orbital location that meets their coverage needs. Further, if the request is granted, GE Americom will be able to avoid providing excess transponder capacity or prematurely terminating service on its existing Satcom K-1 and II-R satellites by switching that traffic to Satcom H-1 years before the end of their useful lives.

10. In sum, grant of GE Americom's request for orbital reassignment is in the public interest. To accomplish this reassignment, the milestone deadlines will be extended. GE Americom has already contracted for the construction of its satellite; it has a follow-on customer base that provides further evidence of its intent and ability to implement its system; and the extensions of time will not result in the loss of available orbital locations for operators who are ready to proceed immediately with implementation of their systems.

IV. ORDERING CLAUSES

11. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that Application File No. 10-DSS-MP/ML-92 IS GRANTED and that the Orbit Assignment Plan set forth in the Appendix to Assignment of Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988), *modified* 5 FCC Rcd 179 (1990), *further modified* in American Satellite Company, 5 FCC Rcd 1186 (Com.Car.Bur. 1990), in GTE Spacenet Corporation, 5 FCC Rcd 3423 (Com.Car.Bur. 1990), in Hughes Communications Galaxy, Inc., 5 FCC Rcd 3423 (Com.Car.Bur. 1990) and in Hughes Communications Galaxy, Inc., 6 FCC Rcd 72 (Com.Car.Bur. 1991), IS FURTHER MODIFIED to assign Satcom H-1 to 85^0 W.L.

12. IT IS FURTHER ORDERED that Application File No. 11-DSS-EXT-92 IS GRANTED, and the completion of construction and launch dates for Satcom H-1 are extended to conform to the anticipated end-of-life of Satcom K-1. Unless extended by the Commission for good cause shown, this authorization shall become null and void in the event the space station is not constructed, launched and successfully place into operation in accordance with the technical parameters and terms and conditions of the Satcom H-1 Authorization Order, *supra*, by the following dates:

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[9] In addition, GE Americom will have no reason to seek renewal of its C-band capacity at 72^0 W.L. if it replaces Satcom II-R with Satcom H-1. This will free the C-band portion of the 72^0 W.L. orbital location after 1995.

[10] *See e.g.* MCI Communications Corporation, 2 FCC Rcd 233 (1987).

[11] The Commission may waive its rules for good cause. 47 C.F.R. §1.3. In general, grant of a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such a waiver is in the public interest. Northeast Cellular Telephone Company v. FCC, 897 F2d 1164, 1166 (D.C. Cir. 1990). In addition, the waiver request must be consistent with the general principles underlying the rule for which the waiver is requested. City of Angeles Broadcasting, Inc. v. FCC, 745 F2d 656 (D.C. Cir. 1984).

[12] MCI Communications Corporation, *supra*.

[13] *See, e.g.*, American Telephone and Telegraph Company, 5 FCC Rcd 5590 (Dom. Fac. Div. 1990) (extension of completion of construction and launch deadlines granted, due in part to the fact that satellite construction had already commenced, and that the company needed the new capacity to provide continued service to its existing customers).

	Construction Commenced	Construction Completed	Launched
Satcom H-1	----------	January 1996	March 1996

13. IT IS FURTHER ORDERED that this Memorandum Opinion and Order will be effective UPON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Tele-Fibernet Corporation — File No. I-T-C-92-177-TC

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, for transfer of control of authorizations to resell international switched voice services and to provide direct service between the United States and Iran

MEMORANDUM, OPINION AND ORDER

Adopted: July 29, 1992; Released: August 12, 1992

By the Chief, International Facilities Division:

1. On June 1, 1992, Tele-Fibernet Corporation (TFN) filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer control of its Section 214 authorizations to LDDS Communications, Inc. (LDDS). The application was put on public notice on June 10, 1992, and no comments were received.

2. TFN is a Virginia corporation that has authority to resell international switched voice service between the U.S. and various international points,[1] and to provide direct international switched voice service between the U.S. and Iran.[2] TFN is a subsidiary of TFN Group Communications, Inc. (Group). TFN operates under the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[3] TFN also provides non-dominant domestic interexchange telephone service pursuant to the Commission's domestic competitive carrier policies.[4]

3. LDDS is a Tennessee corporation that, through its existing subsidiaries, provides interexchange telephone service to various locations throughout the United States as a non-dominant carrier pursuant to the Commission's domestic competitive carrier policies, and resells international switched voice services pursuant to the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[5]

4. The application states that Group will merge with a newly formed subsidiary of LDDS, thereby effecting the indirect transfer of control of TFN to LDDS. Applicants maintain that LDDS is an established interexchange carrier which is legally, technically and financially qualified to provide the service authorized. They also state that TFN will continue to be legally, financially and technically qualified to provide international communications services. The merger will permit LDDS to expand its service area and provide services to a broader array of customers. No tariff changes or regulations are currently proposed.

5. In view of the foregoing, we conclude that the transfer of control of TFN's Section 214 authorizations to LDDS will not adversely affect the public interest.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Tele-Fibernet Corporation, File No. I-T-C-92-177-TC, IS GRANTED and we consent to the transfer of control of TFN's Section 214 authorizations originally granted in File Nos. I-T-C-87-174, I-T-C-90-143 and I-T-C-90-155 (*see* n.1 and 2) to LDDS Communications, Inc.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that TFN must continue to maintain tariffs for the services authorized in this order.

8. IT IS FURTHER ORDERED that TFN must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that TFN shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. § 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Tele-Fibernet Corporation File No. I-T-C-87-174, 2 FCC Rcd 7397 (1987); Tele-Fibernet Corporation File No. I-T-C-90-143, 5 FCC Rcd 7265 (1990).

[2] Tele-Fibernet Corporation File No. I-T-C-90-155, 5 FCC Rcd 6561 (1990).

[3] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 6 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies)*.

[4] Policy and Rules Concerning Rates and Facilities Authorizations for competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980); Second Repoort and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983).

[3] *See*, MidAmerican Communications Corporation File No. I-T-C-91-102-TC, 6 FCC Rcd 4176 (1991); Telemarketing Corporation of Louisiana File No. I-T-C-90-114-TC, 5 FCC Rcd 7263 (1990); Advantage Companies, Inc. File No. I-T-C-90-008-TC, 5 FCC Rcd 694 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-165

In the Matter of

Revision of Part 15 of the Rules to Expand the Restricted Bands of Operation

NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1992; Released: August 12, 1992

Comment Date: November 2, 1992
Reply Comment Date: February 15, 1993

By the Commission:

INTRODUCTION

1. This *Notice of Proposed Rule Making* proposes to amend Part 15 of the rules to restrict the operation of low power, non-licensed transmitters within the frequency bands that were recently authorized for the Global Maritime Distress and Safety System (GMDSS).

BACKGROUND

2. The Commission has established frequency bands within which Part 15 transmitters, or intentional radiators, are prohibited from operating.[1] These restricted bands were established to protect against interference to services involving safety-of-life and services that use very low received signal levels.[2]

3. The GMDSS is an automated ship-to-shore distress alerting system that relies on satellite and advanced terrestrial systems. The GMDSS is used for worldwide alerting, coordinated search and rescue operations and the dissemination of maritime safety information. The GMDSS represents more than a decade of work by the International Maritime Organization (IMO) and the International Telecommunication Union (ITU).[3] On January 16, 1992, the Commission adopted a *Report and Order* incorporating GMDSS requirements into its Maritime Services Rules.[4]

DISCUSSION

4. The frequency bands employed for GMDSS are used for safety-of-life purposes and, therefore, meet the criteria for protection as restricted frequency bands under Part 15. International radio regulations require that the GMDSS bands be protected from other interfering sources.[5] Accordingly, we are proposing that the list of restricted frequency bands in Part 15 be expanded to contain the GMDSS bands. A list of the 17 proposed new restricted bands, along with an explanation of their uses, is contained in Appendix B.[6] We have purposely specified these bands to be as narrow as possible, basing them on the allocated channel bandwidth without guardbands, in order to reduce the impact on Part 15 equipment. We believe the proposed changes will have a minimal impact on the design and operation of Part 15 devices, yet will provide essential protection to GMDSS operations.[7]

5. We also propose to reduce the width of the existing restricted frequency band of 490-510 kHz to 495-505 kHz, effective February 1, 1999. This restricted band provides interference protection to the maritime distress frequency

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[1] *See* 47 CFR Section 15.205. Within the restricted frequency bands, Part 15 transmitters are permitted to radiate only spurious emissions that must not exceed the general radiated emission limits in 47 CFR Section 15.209.

[2] *See First Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989), at para. 61-74. *See*, also, *Memorandum, Opinion and Order*, GEN Docket No. 87-389, 6 FCC Rcd 5405 (1991), at para. 14-17.

[3] The ITU adopted the GMDSS associated revisions to the Radio Regulations in November, 1987. *See*, Final Acts of the World Administrative Radio Conference for Mobile Services (MOB-87), Geneva, 1987. In November 1988, the IMO adopted amendments to the 1974 SOLAS Convention to implement the GMDSS internationally. *See*, Final Acts of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974, on the Global Maritime Distress and Safety System, London, 1988 (GMDSS Amendments).

[4] *See Report and Order*, PR Docket No. 90-480, 7 FCC Rcd 951 (1992). The GMDSS regulations, contained in 47 CFR Part 80, apply to cargo ships of 300 tons gross tonnage and over when traveling on international voyages or in the open sea, and to ships carrying twelve passengers or more irrespective of size when traveling on international voyages or in the open sea. These ships are termed "compulsory ships."

[5] *See* ITU Radio Regulations, RRN38-11, Section 44, N 3067 Mob-87, 1990. As stated therein, any emission capable of causing harmful interference to certain GMDSS frequency bands used for distress, alarm, urgency or safety communications is prohibited. For other GMDSS frequency bands, the ITU regulations state only that emissions causing harmful interference are prohibited.

[6] We have limited our proposal to include only those frequencies requiring special protection based on N 3067 Mob-87 of the ITU Radio Regulations. (Nine of the frequencies are already included in the restricted bands.) Although the U.S. implementation of the GMDSS includes several other frequencies, we are not proposing to include these because the ITU Radio Regulations do not specify the same protection requirements for these frequencies. We believe our existing Part 15 regulations are adequate to avoid harmful interference on these frequencies, satisfying the provisions of the ITU regulations.

[7] We are aware that some existing Part 15 transmitters sweep through a number of these proposed restricted bands. However, swept frequency devices are exempt, under certain conditions, from the restricted band requirements. *See* 47 CFR Section 15.205(d)(1).

500 kHz. The guardbands for that frequency are scheduled to be reduced when the GMDSS is fully implemented on February 1, 1999.

6. *Transition provisions.* The GMDSS is being phased in between 1992 and 1999. Because ships can start using GMDSS equipment today, we believe that the new restricted bands should become effective as soon as possible. Accordingly, we propose that any Part 15 intentional radiator that is verified, or for which an application for a grant of equipment authorization is submitted, on or after 90 days from the effective date of a Report and Order in this proceeding must comply with the requirements associated with the new restricted bands of operation. Similarly, any Part 15 intentional radiator that is manufactured or imported on or after 15 months from this effective date must comply with the new restricted band requirements.

PROCEDURAL MATTERS

7. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

8. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

9. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comment on or before **November 2, 1992**, and reply comments on or before **February 15, 1993**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

10. The proposed action is authorized under Sections 4(i), 301, 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), and 303(r).

11. For further information regarding this *Notice of Proposed Rule Making*, contact John Reed, Office of Engineering and Technology, (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This rule making proceeding is initiated to obtain comment regarding the addition of new restricted bands of operation, representing frequency bands employed by the Global Maritime Distress and Safety System (GMDSS) under Part 80 of our rules, for Part 15 intentional radiators.

Objectives

The Commission seeks to add these new restricted bands of operation to provide additional protection against harmful interference to the GMDSS.

Legal Basis

The proposed action is authorized under Sections 4(i), 301, 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), and 303(r).

Reporting, Recordkeeping and Other Compliance Requirements

Manufacturers of Part 15 transmitters are already required to measure emissions from their products. An increase in the number of restricted frequency bands will not impact the requirement for making and reporting these measurements to the Commission. Accordingly, we do not expect any significant increase or decrease in the overall recordkeeping requirements.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact and Number of Small Entities Involved

Part 15 transmitters are not permitted to operate within the restricted frequency bands. Further, spurious emissions from Part 15 transmitters that fall within these bands must be reduced to the general radiated emission limits in 47 CFR Section 15.209. Conceivably, the addition of new restricted bands could require manufacturers to redesign their products to operate on other frequencies or to further reduce spurious emissions. However, we believe that there are few, if any, Part 15 devices currently operating within these frequency bands. In addition, the majority of the proposed new restricted bands are at lower frequencies where spurious emissions from Part 15 transmitters must already comply with the general limits in 47 CFR Section 15.209. Thus, we expect any impact from this proposal to be minimal.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with Stated Objectives

None.

APPENDIX B

The GMDSS frequency bands proposed for addition to the list of restricted frequency bands in 47 CFR Section 15.205 are:

495.0-505.0 kHz[1]	8414.25-8414.75 kHz
4123.5-4126.5 kHz	12.2885-12.2915 MHz
4177.25-4177.75 kHz	12.51975-12.52025 MHz
4207.25-4207.75 kHz	12.57675-12.57725 MHz
6213.5-6216.5 kHz	16.4185-16.4215 MHz
6267.75-6268.25 kHz	16.69475-16.69525 MHz
6311.75-6312.25 kHz	16.80425-16.80475 MHz
8289.5-8292.5 kHz	156.52475-156.52525 MHz
8376.25-8386.75 kHz	1645.5-1646.5 MHz

These frequency bands are used for the following purposes:

I. Digital Selective Calling (DSC) for distress and safety calls, with a bandwidth of ±0.25 kHz:

4207.5 kHz	12.577 MHz
6312.0 kHz	16.8045 MHz
8414.5 kHz	156.525 MHz

II. Alerting via satellite EPIRBs:

1645.5-1646.5 MHz[2]

III. Narrowband Direct Printing (NBDP) used exclusively for distress and safety communications, with a bandwidth of ±0.25 kHz:

4177.5 kHz	12.520 MHz
6268.0 kHz	16.695 MHz
8376.5 kHz	

IV. Radiotelephony (SSB) used for distress and safety communications, with a bandwidth of ±1.5 kHz:

4125 kHz[3]	12.29 MHz
6215 kHz	16.42 MHz
8291 kHz	

[1] The band 490-510 kHz is already designated as a restricted band; however, we propose to narrow this band to 495-505 kHz on February 1, 1999.

[2] In addition to EPIRBs, this band can be used for the relay of distress alerts between satellites.

[3] This band may also be used by aircraft stations to communicate with stations of the maritime mobile service for distress and safety purposes, including search and rescue.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-39

In the Matter of

DOTHAN BROADCASTING CO., INC.
Licensee of Radio Station
WAGF(AM)
Dothan, Alabama

Order to Show Cause Why the
License for Station WAGF(AM),
Dothan, Alabama, Should
Not be Revoked

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 1992; Released: August 13, 1992

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority[1] , has before it a Petition for Extraordinary Relief, filed June 12, 1992, by Dothan Broadcasting Co., Inc. ("DBC"), which seeks to assign the license of WAGF(AM), Dothan, Alabama, to James R. Wilson, III ("Wilson") pursuant to the Commission's minority distress sale policy.

2. By *Order to Show Cause and Hearing Designation Order*, 7 FCC Rcd 2126 (1992), the Commission ordered DBC to show cause why its license for WAGF(AM) should not be revoked for allegedly being off the air without Commission authority since May 22, 1991. By *Order* released May 27, 1992, FCC 92M-611, the Presiding Judge suspended all procedural dates, including the date set for commencement of the hearing, pending the Bureau's consideration of the instant assignment application.

3. In order to qualify for distress sale relief, a licensee must show that the hearing has not yet commenced, that there is significant minority ownership in the proposed transferee, and that the station will be sold at a maximum of 75 percent of the fair market value as of the date of the designation for hearing. *Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980); *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978); and *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978). Thus, the buyer and the seller must each retain an appraiser and submit an appraisal of the fair market value of the station as of the date on which the license was designated for hearing. If the difference between the two appraisals is more than 5% of the average of the appraisals, the parties must jointly choose and retain a third appraiser. Then, the average of the three appraisals will constitute the station's fair market value. *Grayson Enterprises, Inc.*, 77 FCC 2d 156 (1980), as clarified by *Patrick Henry*, 79 FCC 2d 393 (1980). Finally, the appraisals must contain specific documentation and supporting computations. *Northland Television Inc.*, 72 FCC 2d 51, 56 (1979), as further clarified in *Grayson*, 77 FCC 2d at 164.

4. The threshold criteria for relief by distress sale have been met. The hearing has not yet commenced. The proposed assignee, who is Black, is a member of a minority group. Finally, DBC has established that the proposed sale price does not exceed 75% of the station's fair market value.

5. The proposed sale price for the station is $60,000. DBC has submitted two appraisals of the station's fair market value, one commissioned by DBC and the other by Wilson. One appraisal sets a value of $82,500 and the other estimates its value at $80,000. Since the appraisals do not differ by more than 5% of the average of the appraisals, a third appraisal is not required. Both appraisers are experienced in the valuation of media properties and both have provided documentation to fully describe the basis for the appraisals. Both appraisals comply with the Commission's requirements. *See Grayson*, 77 FCC 2d at 164; *Northland*, 72 FCC 2d at 54-55. Moreover, and consistent with Commission policy, these appraisals assume that WAGF(AM) is a going concern and establish their valuations as of the date of designation. *Grayson, supra; Northland, supra.* Finally, the proposed sale price is less than 75 percent of the fair market value.

6. The Bureau has processed the assignment application and Wilson has been found fully qualified to be a Commission licensee.[2] Therefore, we shall grant the Petition for Extraordinary Relief, and the application to assign WAGF(FM), subject to the condition that the contemplated assignment is, in fact, consummated within ninety (90) days of the release date of this *Memorandum Opinion and Order*. Should this condition not be met, the above-captioned proceeding will return to active hearing status and the hearing proceeding will resume in accordance with the *Order to Show Cause, supra.*

7. Accordingly, IT IS ORDERED that, subject to the condition imposed in paragraph 6, above, DBC's Petition for Extraordinary Relief IS GRANTED; the application for assignment of the license of WAGF(AM) (BAL-920612EB) IS GRANTED; and this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] *See Faith Center, Inc.*, 54 RR 2d 1286, 1287 n.11 (1983); *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 859 (1982).

[2] Wilson is the permittee of WJJN(FM), Dothan, Alabama.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-140

In Re

Revision of
Radio Rules and Policies

ORDER DEFERRING EFFECTIVE DATE

Adopted: July 30, 1992; Released: July 30, 1992

By the Commission:

1. On April 10, 1992, the Commission released a *Report and Order* in the above captioned proceeding. Various parties, including Nashville Partners, L.P., National Association of Black Owned Broadcasters, National Black Media Coalition, Telecommunications Research and Action Center, and KVEN Broadcasting Corporation have requested that the effective date of the rule changes adopted in that *Report and Order* be deferred or stayed for 60 days or pending action on petitions for reconsideration.

2. We agree with the parties' contention that it could be disruptive to the industry and the public for the new rules to take effect before reconsideration has been completed. Good cause accordingly exists for delaying the effective date of the new rules and the filing of applications for the acquisition of stations that could be granted only under the new rules. To achieve the earliest possible benefits from the new rules, we intend to act promptly on the petitions for reconsideration.

3. Accordingly, IT IS ORDERED that the August 1, 1992, effective date of the rules adopted in the *Report and Order* in Docket 91-140, 7 FCC Rcd 1755 (1992), IS DEFERRED pending action on the petitions for reconsideration of that *Report and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 31, 1992

INFORMATION ON APPLICATION FILING PROCEDURES FOR THE INTERACTIVE VIDEO AND DATA SERVICE

GEN Docket No. 91-2

On January 16, 1992, the Commission adopted a *Report and Order (R&O)* in GEN Docket No. 91-2 establishing an Interactive Video and Data Service (IVDS) under Part 95 of its Rules (47 C.F.R. Part 95). In the *R&O* the Commission stated that it would announce by Public Notice the date on which it would begin accepting applications for IVDS system licenses as well as other pertinent information concerning licensing IVDS systems. On July 17, 1992, the Commission released a Public Notice opening a filing window for service area #1. The purpose of this Public Notice is to establish an IVDS application filing window and explain the filing procedures necessary for filing applications for an IVDS system license in service areas #2 (Los Angeles, CA), #3 (Chicago, IL), and #4 (Philadelphia, PA). For a description of the service areas see the Commission's January 24, 1992, Public Notice, Report No. 92-40.

Applications for an IVDS license for these three service areas must be received at the official filing location listed herein during the three-day filing period beginning September 1, 1992, and ending September 3, 1992. Applications received before September 1, or after September 3, 1992, will be dismissed as untimely filed. The back-up filing procedure and the extra day policy do not apply to IVDS applications.[1] NOTE: Applicants may have an interest in only one application in each service area. All applications must be filed on FCC Form 155 (a separate application is required for each service area) and each application must be accompanied by a separate check made out to the Federal Communications Commission or FCC in the amount of $1,400.00. Failed payment or postdated checks will result in the application being dismissed with prejudice. In Section I of Form 155, the "Applicant Name" block must include the applicant's name (either typed or printed) followed by the signature (original) of an individual authorized to sign the application. The mailing address should be the address to which the applicant wishes official correspondence sent. The number of the service area being applied for (either "002", "003", or "004") must be specified in the box labeled "Call Sign". The fee type code entered in Column (A) must be "PAI", the fee multiple in Column (B) must be "40", and the fee due in column (C) must be $1,400.00. Each individual application (Form 155) and accompanying check ($1,400.00) must be in an individual sealed envelope and properly addressed (see mail in address). Multiple applications, properly packaged, may be delivered in one larger, properly addressed container.

The Commission's official filing location for these applications is Mellon Bank in Pittsburgh, Pa. Applications may be delivered to Mellon Bank in one of two ways, either mailed in or walked in.

Mail-ins

Filings mailed in must be mailed to:

Federal Communications Commission
Interactive Video and Data Service
P.O. Box 358365
Pittsburgh, PA 15251-5365

(This address must be used on the individually sealed envelopes.)

Walk-Ins

Pursuant to the provisions of 47 C.F.R. § 0.401(b)(2), applications may be hand-delivered. Applications hand-delivered must be in a sealed envelope with the mail-in address specified above on its face. A separate envelope is needed for each application and accompanying check. Hand-delivered applications must be delivered to One Mellon Bank Center, 500 Grant Street, Pittsburgh, PA. 15258 anytime between 12:01 a.m. September 1, 1992, and 11:59 p.m. September 3, 1992.

The street entrance to the Window Filing location is on the Grant Street side of the building (across from the US Air ticket office). Signs will be posted in both One Mellon Bank Center and Three Mellon Bank Center indicating the Filing Window location. The "deliverer" should proceed directly to the street entrance described above and identify himself (herself) as having applications for the IVDS filing window. If a copy is proffered for stamping, *one* receipt only will be date stamped per application and returned. CAUTION: The filing instructions incorporated in this Public Notice are only in effect for the purposes stated herein. These procedures override any other procedures that may be set forth in the Commission's Rules. Failure to follow the filing procedures specified herein will render an application unacceptable for filing. Such an application will be dismissed with prejudice.

After the filing window has closed the Commission will issue a Public Notice as soon as feasible listing the applications filed for these three service areas. In the event the

[1] The back-up filing procedure enables certain applicants to file late if they follow certain procedures and if their applications are lost or delayed in transit to Pittsburgh, Pennsylvania. The extra day policy allows certain applicants to file one day after the filing deadline. These policies, however, only apply to time critical, feeable applications previously filed in Washington, D.C. and IVDS applications, which are new, have never been filed in Washington. Thus, if an IVDS application is received in Pittsburgh on September 4, 1992, the day after the filing window closes, or thereafter (regardless of the reason for delay), the application will be dismissed as untimely filed.

Commission receives more than two acceptable applications for an IVDS system license for any of the service areas, all the applications for that particular service area will be considered mutually exclusive. The Commission will use a lottery conducted in accordance with 47 C.F.R § 1.972 to choose among mutually exclusive applications. If a lottery is necessary, the Commission will announce by Public Notices (1) when a lottery will be held and (2) the lottery winners (tentative selectees). Tentative selectees will then have two business days from the date of the Public Notice announcing the winners to file a FCC Form 574 (plus required showings) amending their original application. The burden will be on the tentative selectees to provide all necessary information. If for some reason one or both of the tentative selectees' applications in a service area are dismissed, the Commission will open another filing window for that service area.

While the Commission intends to open all 734 service areas as quickly as possible, it will not issue system licenses until the first IVDS transmitter has been type accepted for operation in this service. Moreover, it is important to remember that an applicant that has been awarded an IVDS system license must meet certain construction benchmarks or automatically lose the license. Further an IVDS system licensee is prohibited from transferring the license until the 5-year construction benchmark has been met.

For further information contact Consumer Assistance Branch, 717-337-1212.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 28, 1992

COMMENTS INVITED ON SAN ANTONIO AREA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the San Antonio area (Region 53).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 53 consists of the following counties: Val Verde, Edwards, Kerr, Gillespie, Real, Bandera, Kendall, Kinney, Uvalde, Medina, Bexar, Comal, Guadalupe, Gonzales, Lavaca, Dewitt, Karnes, Wilson, Atascosa, Frio, Zavala, Maverick, Dimmit, LaSalle, McMullen, Live Oak, Bee, Goliad, Victoria, Jackson, Calhoun, Refugio, Aransas, San Patricio, Nueces, Jim Wells, Duval, Webb, Kleberg, Kenedy, Brooks, Jimm Hogg, Zapata, Starr, Hidalgo, Willacy and Cameron. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **September 4, 1992** and reply comments on or before **September 21, 1992.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-169 San Antonio Area-Public Safety Region 53.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 3, 1992

COMMENTS INVITED ON OKLAHOMA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Oklahoma (Region 34).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 34 consists of the State of Oklahoma. General Docket No. 87-112, 3 FCC Rcd 2113 (1988).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **September 9, 1992** and reply comments on or before **September 24, 1992.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-171 Oklahoma-Public Safety Region 34.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff F.C.C. No. 17	Transmittal No. 42

ORDER

Adopted: August 4, 1992; Released: August 4, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 22, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective August 5, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 17 for AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, Dataphone Digital Service, and Local Channel Services.

2. On July 29, 1992 MCI Telecommunications Corporation (MCI) and Sprint Communications Company Limited Partnership (Sprint) filed petitions to reject or suspend and investigate Contract Tariff Transmittal No. 42.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 17, Contract Tariff Transmittal No. 42 and the petitions filed by MCI and Sprint. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 17, Contract Tariff Transmittal No. 42, filed by MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff F.C.C. No. 18	Transmittal No. 43

ORDER

Adopted: August 4, 1992; Released: August 4, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 22, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective August 5, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 18 for AT&T Accunet Spectrum of Digital Services, Accunet Reserved Digital Service, Accunet T1.5 Service, Dataphone Digital Service, and Local Channel Services.

2. On July 29, 1992 MCI Telecommunications Corporation (MCI) and Sprint Communications Company Limited Partnership (Sprint) filed petitions to reject or suspend and investigate Contract Tariff Transmittal No. 43.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 18, Contract Tariff Transmittal No. 43 and the petitions filed by MCI and Sprint. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 18, Contract Tariff Transmittal No. 43, filed by MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-426
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-427
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-428
WISCONSIN BELL, INC.,	File No. E-89-429
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-430
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-431
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-432
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-433
and	
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-434

Defendants.

ORDER

Adopted: August 5, 1992; Released: August 7, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On July 24, 1992, Swidler & Berlin, Chtd. ("Swidler") filed a motion for leave to withdraw as counsel of record (Motion) for the complainant, Telesphere Network, Inc. (Telesphere), in the above-captioned proceedings. In addition, Swidler requested an extension of the discovery and briefing schedule established for these proceedings.

2. Telesphere is currently a debtor in bankruptcy before the United States Bankruptcy Court for the Northern District of Illinois. On April 17, 1992, in response to a letter from the Deputy Chief, Enforcement Division, Common Carrier Bureau,[1] Swidler, as counsel for Telesphere, represented to the Commission that Telesphere intended to continue pursuit of these cases and that continued prosecution thereof was authorized by the Bankruptcy Code. In June 1992, the Enforcement Division, Common Carrier Bureau, issued an order that established a discovery timetable and briefing schedule for these rate of return complaint proceedings.[2] Subsequent to the release the *Discovery Order*, Swidler filed a motion to stay the proceedings, stating that it had become unclear whether Swidler was authorized to represent Telesphere. In denying the motion to stay, we noted that it did not appear that Telesphere itself had requested or had concurred in Swidler's request. Under those circumstances, we concluded that Swidler lacked standing to request a stay of these proceedings upon its own behalf.[3]

3. In its present Motion, Swidler states that it was informed in mid-June 1992 that its representation of Telesphere has never been approved by the Bankruptcy Court and Swidler has not been retained to act as Telesphere's counsel in these proceedings. Swidler concludes, therefore, that it is without authority to act as counsel in these proceedings. In addition, Swidler states that it presently has no right to payment for any of its post-bankruptcy petition legal services and costs. Swidler further states that it has a substantial pre-petition claim against Telesphere's estate. These factors, it argues, create an "irrefutable conflict of interest" for Swidler and its withdrawal as counsel of record is required by the Rules of Professional Responsibility.

4. Swidler further requests that we extend the discovery and briefing deadlines in these proceedings so that Telesphere is not prejudiced and will have the opportunity to retain legal counsel and participate fully in these proceedings.

5. We will grant Swidler's motion to withdraw as counsel for Telesphere in the above-captioned proceedings. However, we will not extend the discovery and briefing schedules established for these proceedings for the same reasons stated in our previous order denying Swidler's request for a stay[4] Swidler has no standing to request such an extension under the circumstances it describes and there is no indication that Telesphere itself joined in or supports the request.

6. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Swidler's Motion for Leave to Withdraw as Counsel for Complainant and for an Extension of the Discovery and

[1] Letter from Gregory A. Weiss, Deputy Chief, Enforcement Division, Common Carrier Bureau to Warren G. Lavey, Esquire and David E. Springer, Esquire, Skadden, Arps, Slate, Meagher & Flom and Gregory M. Casey, Esquire and Jack Pace, Esquire, Telesphere Communications, Inc. dated April 1, 1992.

[2] *See* Telesphere Network, Inc. v. The Chesapeake and Potomac Telephone Companies, *et al.*, *Order*, 7 FCC Rcd 3515 (Com.Car.Bur. 1992) (*Discovery Order*).

[3] *See* Telesphere Network, Inc. v. The Chesapeake and Potomac Telephone Companies, *et al.*, *Order*, DA 92-937 (released July 20, 1992).

[4] We would expect and encourage a duly appointed representative of Telesphere's estate or its retained counsel to take the appropriate steps to comply with the timetables and schedules established by the Commission should it wish to pursue its complaints.

Briefing Schedule Set Forth in Order DA 92-687 IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington D. C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-160
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-90-161
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-162
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-163
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-164
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-165
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-166
INDIANA BELL TELEPHONE COMPANY, INC.,	File No. E-90-167
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-168
THE OHIO BELL TELEPHONE COMPANY,	File No. E-90-169
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-170
NEVADA BELL TELEPHONE COMPANY,	File No. E-90-174
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-176
and	
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-177
Defendants.	

ORDER

Adopted: August 5, 1992; Released: August 7, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On July 24, 1992, Swidler & Berlin, Chtd. ("Swidler") filed a motion for leave to withdraw as counsel of record (Motion) for the complainant, Telesphere Network, Inc. (Telesphere), in the above-captioned proceedings.

2. Telesphere is currently a debtor in bankruptcy before the United States Bankruptcy Court for the Northern District of Illinois. On April 17, 1992, in response to a letter from the Deputy Chief, Enforcement Division, Common Carrier Bureau,[1] Swidler, as counsel for Telesphere, represented to the Commission that Telesphere intended to continue pursuit of these cases and that continued prosecution thereof was authorized by the Bankruptcy Code. In August 1992, the Enforcement Division, Common Carrier Bureau, issued an order that established a discovery timetable and briefing schedule for these rate of return complaint proceedings.[2]

3. In its Motion, Swidler states that it was informed in mid-June 1992 that its representation of Telesphere has never been approved by the Bankruptcy Court and Swidler has not been retained to act as Telesphere's counsel in these proceedings. Swidler concludes that it is without authority to act as counsel in these proceedings. In addition, Swidler states that it presently has no right to payment for any of its post-bankruptcy petition legal services and costs. Swidler further states that it has a substantial pre-petition claim against Telesphere's estate. These factors, it argues, create an "irrefutable conflict of interest" for Swidler and its withdrawal as counsel of record is required by the Rules of Professional Responsibility.

4. We will grant Swidler's motion to withdraw as counsel for Telesphere in the above-captioned proceedings.[3]

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Swidler's Motion for Leave to Withdraw as Counsel for Complainant IS GRANTED.

[1] Letter from Gregory A. Weiss, Deputy Chief, Enforcement Division, Common Carrier Bureau to Warren G. Lavey, Esquire and David E. Springer, Esquire, Skadden, Arps, Slate, Meagher & Flom and Gregory M. Casey, Esquire and Jack Pace, Esquire, Telesphere Communications, Inc. dated April 1, 1992.

[2] *See* Telesphere Network, Inc. v. The Bell Telephone Company of Pennsylvania, *et al.*, *Order*, DA 92-995 (released August 3, 1992).

[3] We would expect and encourage a duly appointed representative of Telesphere's estate or its retained counsel to take the appropriate steps to comply with the timetables and schedules established by the Commission should it wish to pursue its complaints.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

NEW ENGLAND TELEPHONE AND TELEPHONE AND TELEGRAPH COMPANY, and NEW YORK TELEPHONE COMPANY,
Defendants.

File No. E-90-358

File No. E-90-359

ORDER

Adopted: August 5, 1992; Released: August 7, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On August 3, 1992, Swidler & Berlin, Chtd. ("Swidler") filed a motion for leave to withdraw as counsel of record (Motion) for the complainant, Telesphere Network, Inc. (Telesphere), in the above-captioned proceedings.

2. Telesphere is currently a debtor in bankruptcy before the United States Bankruptcy Court for the Northern District of Illinois. On April 17, 1992, in response to a letter from the Deputy Chief, Enforcement Division, Common Carrier Bureau,[1] Swidler, as counsel for Telesphere, represented to the Commission that Telesphere intended to continue pursuit of these cases and that continued prosecution thereof was authorized by the Bankruptcy Code. In July 1992, the Enforcement Division, Common Carrier Bureau, issued an order that established a discovery timetable and briefing schedule for these rate of return complaint proceedings.[2]

3. In its Motion, Swidler states that it was informed in mid-June 1992 that its representation of Telesphere has never been approved by the Bankruptcy Court and Swidler has not been retained to act as Telesphere's counsel in these proceedings. Swidler concludes that it is without authority to act as counsel in these proceedings. In addition, Swidler states that it presently has no right to payment for any of its postbankruptcy petition legal services and costs. Swidler further states that it has a substantial pre-petition claim against Telesphere's estate. These factors, it argues, create an "irrefutable conflict of interest" for Swidler and its withdrawal as counsel of record is required by the Rules of Professional Responsibility.

4. We will grant Swidler's motion to withdraw as counsel for Telesphere in the above-captioned proceedings.[3]

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Swidler's Motion for Leave to Withdraw as Counsel for Complainant IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] Letter from Gregory A. Weiss, Deputy Chief, Enforcement Division, Common Carrier Bureau to Warren G. Lavey, Esquire and David E. Springer, Esquire, Skadden, Arps, Slate, Meagher & Flom and Gregory M. Casey, Esquire and Jack Pace, Esquire, Telesphere Communications, Inc. dated April 1, 1992.

[2] *See* Telesphere Network, Inc. v. New England Telephone and Telegraph Company, *et al.*, *Order*, DA 92-991 (released July 31, 1992).

[3] We would expect and encourage a duly appointed representative of Telesphere's estate or its retained counsel to take the appropriate steps to comply with the timetables and schedules established by the Commission should it wish to pursue its complaints.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL TELEPHONE SERVICES,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-91-049
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-91-050
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-91-051
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-91-052
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-91-053
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-91-054
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-91-057
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-058
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-91-059
PACIFIC BELL TELEPHONE COMPANY,	File No. E-91-060
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-91-061
NEW YORK TELEPHONE COMPANY,	File No. E-91-062
Defendants.	

ORDER

Adopted: August 5, 1992; Released: August 7, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On July 24, 1992, Swidler & Berlin, Chtd. ("Swidler") filed a motion for leave to withdraw as counsel of record (Motion) for the complainant, National Telephone Services (NTS), in the above-captioned proceedings. In addition, Swidler requested an extension of the discovery and briefing schedule established for these proceedings.

2. NTS is an asset of Telesphere Network, Inc. (Telesphere); Telesphere is currently a debtor in bankruptcy before the United States Bankruptcy Court for the Northern District of Illinois.[1] On April 17, 1992, in response to a letter from the Deputy Chief, Enforcement Division, Common Carrier Bureau,[2] Swidler, as counsel for NTS, represented to the Commission that NTS intended to continue pursuit of these cases and that continued prosecution thereof was authorized by the Bankruptcy Code. In June 1992, the Enforcement Division, Common Carrier Bureau, issued an order that established a discovery timetable and briefing schedule for these rate of return complaint proceedings.[3] Swidler filed a motion to stay these proceedings, stating that it had become unclear whether Swidler was authorized to represent NTS. In denying the request to stay, we noted that it did not appear that NTS itself had requested or had concurred in Swidler's request for a stay. Under those circumstances, we concluded that Swidler lacked standing to request a stay of these proceedings upon its own behalf.[4]

3. In its present Motion, Swidler states that it was informed in mid-June 1992 that its representation of NTS has never been approved by the Bankruptcy Court and Swidler has not been retained to act as NTS's counsel in these proceedings. Swidler now concludes that it is without authority to act as counsel in these proceedings. In addition, Swidler states that it presently has no right to payment from Telesphere for any of its post-bankruptcy petition legal services and costs. Swidler further states that it has a substantial pre-petition claim against Telesphere's estate. These factors, it argues, create an "irrefutable conflict of interest" for Swidler and its withdrawal as counsel of record is required by the Rules of Professional Responsibility.

4. Swidler further requests that we extend the discovery and briefing deadlines in these proceedings so that Telesphere/NTS is not prejudiced and will have the opportunity to retain legal counsel and participate fully in these proceedings.

5. We will grant Swidler's motion to withdraw as counsel for NTS in the above-captioned proceedings. However, we will not extend the discovery and briefing schedules established for these proceedings for the same reasons

[1] NTS was purchased by subsequent to the filing of these complaints.

[2] Letter from Gregory A. Weiss, Deputy Chief, Enforcement Division, Common Carrier Bureau to Warren G. Lavey, Esquire and David E. Springer, Esquire, Skadden, Arps, Slate, Meagher & Flom and Gregory M. Casey, Esquire and Jack Pace, Esquire, Telesphere Communications, Inc. dated April 1, 1992.

[3] *See* National Telephone Services v. Bell Telephone Company of Pennsylvania, *et al.*, *Order*, 7 FCC Rcd 3959 (Com.Car.Bur. 1992).

[4] *See* National Telephone Services v. Bell Telephone Company of Pennsylvania, *et al.*, *Order*, DA 92-939 (released July 20, 1992).

stated in our previous order denying Swidler's request for a stay.[5] Swidler has no standing to request such an extension under the circumstances it describes and there is no indication that NTS itself joined in or supports the request.

6. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Swidler's Motion for Leave to Withdraw as Counsel for Complainant and for an Extension of the Discovery and Briefing Schedule Set Forth in Order DA 92-773 IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[5] We would expect and encourage a duly appointed representative of Telesphere's estate or its retained counsel to take the appropriate steps to comply with the timetables and schedules established by the Commission should it wish to pursue NTS' complaints.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-204

In re Applications of

CENTER FOR STUDY AND APPLICATION OF BLACK ECONOMIC DEVELOPMENT — File No. BRED-900131UA

For Renewal of License of
Station KUCB-FM, Des Moines, Iowa

IOWA ACORN BROADCASTING CORPORATION — File No. BPH-900102MB

MINORITY COMMUNICATIONS, INC. — File No. BPH-900116MA

For Construction Permit
for New FM Station,
Des Moines, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1992; Released: August 14, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE

1. Before the Review Board is Center For Study and Application of Black Economic Development's Interlocutory Appeal to the Review Board of the Denial on Center's Request for Continuance, dated July 20, 1992, and filed July 24, 1992. Center avers that the Presiding Officer erroneously denied Center's motion for continuance by *Order*, FCC 92M-779, entered July 14, 1992, and asks for a stay of all proceedings until the Board is able to review Center's Third Motion to Disqualify Presiding Judge. The Mass Media Bureau filed an Opposition on August 3, 1992. On August 4, 1992, Center filed Center's Interlocutory Appeal to the Review Board of the Denial on Center's Request for Continuance, Filed July 20, 1992, to which counsel attached a copy of his calendar for August and much of September, 1992.

2. Center's request is governed by section 1.301(b) of the Commission's Rules, which provides for interlocutory appeals only if allowed by the Presiding Officer.[1] 47 C.F.R. sec. 1.301(b). There is no record here of any request for permission to file an appeal on Center's behalf and no record of permission from the Presiding Officer.[2] Thus, Center's appeal of the ruling in question is not properly before the Board and will be dismissed. Furthermore, although Center references pleadings filed before the Presiding Officer, it has offered no reasons as to why the Presiding Officer's ruling on these pleadings was in error.[3]

3. Center's request that the hearing be stayed pending action on a motion to disqualify the Presiding Officer is not a sufficient or well-grounded reason for granting the instant request for continuance. Section 1.245 of the Commission's Rules, 47 C.F.R. sec. 1.245, sets forth the governing procedures for seeking disqualification of a presiding officer and specifically provides for automatic suspension of a hearing if a presiding officer's adverse ruling on a motion for disqualification is timely appealed. Thus, there is no need to continue the scheduled hearing in anticipation of an appeal of a disqualification motion.[4]

4. ACCORDINGLY, IT IS ORDERED That Center for Study and Application of Black Economic Development's Interlocutory Appeal to the Review Board of the Denial on Center's Request for Continuance, filed July 24, 1992, IS DISMISSED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[1] Appeals are allowed as a matter of right under section 1.301(a) under limited circumstances not present here.

[2] On July 28, 1992, the Presiding Officer issued an *Order*, FCC 92M-824, which denied the Request for Leave to File Response to Memorandum Opinion and Order Released July 15, 1992, filed by Center on July 24, 1992, after the instant Request for Continuance was filed with the Board. Although Center's Request for Leave to File Response was not directed at permission to appeal to the Board, even if we were to construe it as a request for such permission, then we would construe the ALJ's *Order* as a denial of permission.

[3] Although Center's interlocutory appeal states that these pleadings and the Presiding Officer's *Order* were attached as exhibits, no exhibits were attached to its appeal.

[4] No such appeal has been received by the Board to date. We do not construe Center's prayer that the Board "grant its request to Disqualify presiding Judge Sippel" in its concluding sentence as an appeal of the ALJ's action on its Motion to Disqualify, for that Motion was still pending before the ALJ when the instant request for continuance was filed.

[5] Because the initial hearing date is imminent, we are making prepublication copies available to the Presiding Officer and counsel for the parties.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PUERTO RICO TELEPHONE COMPANY File No. 27241-CD-P/L-01-90

For facilities in the
Public Land Mobile Service
on Station KNKM884
at San Juan, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 1992; Released: August 13, 1992

By the Chief, Common Carrier Bureau:

1. Puerto Rico Telephone Company (Puerto Rico) seeks reconsideration of the action of the Mobile Services Division (MSD) in denying its request for an extension of time to construct the captioned facilities at various locations on its system at San Juan, Puerto Rico.[1] The captioned application proposes relocation of certain system sites, installation of two new transmitters at Guayama and Vieques, Puerto Rico, and an overall conversion from existing private paging facilities on frequency 929.9875 MHz to common carrier facilities on frequency 931.9875 MHz.[2] For the reasons discussed below, we deny Puerto Rico's Petition for Reconsideration (Petition).

2. The MSD granted Puerto Rico a one-year construction permit on April 19, 1991, which accordingly terminated on April 19, 1992. On April 9, 1992, it filed an FCC Form 489 to request an extension of time to complete construction, referencing "various technical problems [in the] software related to out [sic] main control point and signal coverage." *Extension Request*, at Addendum A. Puerto Rico further explained that canvassing potential software vendors took "more time than expected" and that because the choice of software was not made until March 10, 1992, construction could not be completed until late October 1992. *Id.* The MSD rejected Puerto Rico's extension of time request by letter dated May 14, 1992, stating that "[Puerto Rico] has not shown causes beyond its control or demonstrated why it could not meet the due diligence requirement" set forth in Section 22.43(b)(1) of the rules. *See supra*, note 1.

3. Puerto Rico argues on reconsideration that it should have been granted an extension because relocation and conversion of its existing facilities to a new frequency raised problems that do not exist when constructing a new system. Petition at 2. Puerto Rico also contends that the MSD mistakenly interpreted the captioned proposal to be a less demanding proposal for construction of new facilities.

4. Section 22.43(b)(1) of the rules provides that:

> Application for extension of time to complete construction may be made on FCC Form 489 [and] must be filed prior to the expiration of the construction period. Extensions will be granted only if the licensee shows that the failure to complete construction is due to causes beyond his control. No extensions will be granted for delays caused by lack of financing, lack of site availability, for the assignment or transfer of control of an authorization, or for failure to timely order equipment. If the licensee orders equipment within 90 days of the license grant, a presumption of due diligence is created.

Puerto Rico did not order its equipment until March 10, 1992, nearly one year after it received its construction permit. It therefore does not qualify for the 90-day presumption of due diligence set forth in Section 22.43(b)(1). Accordingly, we find that Puerto Rico failed to pursue its construction schedule with due diligence as the Commission requires.

5. Puerto Rico also contends that the construction delay ineluctably flowed from its "commitment" to maintaining continuous service while at the same time effecting the proposed conversion to a new system, and the totality of the situation thereby presented causes beyond its control. Petition at 3. Puerto Rico asserts that its desire to provide uninterrupted service to the public while simultaneously coordinating a software upgrade with the recall of 3,000 receiver units for retooling, and the replacement of crystals in its paging transmitters were causes beyond its control. We reject these assertions.

6. It appears that Puerto Rico had not begun any part of its construction schedule when it requested an extension of time, and it now argues that its "commitment" to providing continuous service justified waiting until nearly one month prior to the expiration of its construction permit before placing its first equipment order. Puerto Rico's argument implies that, if it had chosen to stop service on its current frequency during the transition phase, it could have met the construction deadline on the captioned authorization. Furthermore, it would be contrary to the public interest were we to allow paging permittees to defer construction until the eleventh hour simply because they were unable to coordinate construction with operation of existing facilities in a timely manner. In *Centrapage of Vermont, Inc.*, 6 FCC Rcd 273, 274 (Com. Car. Bur. 1991), the Bureau rejected a paging permittee's request for an extension of time to complete construction of a base station facility, holding that its decision to defer construction until it had received an accompanying control station authorization, which was not granted until two months prior to the expiration of its base station permit, was a condition within the permittee's control. The Bureau further ruled that an ensuing winter storm could have been avoided had the applicant not waited until it was granted

[1] Letter from Chief, Mobile Services Division, Common Carrier Bureau, No. 63500-JSG (May 14, 1992).
[2] See *Public Notice*, Rep. No. PMS-90-49 (Sept. 5, 1990).

the control authorization. *Id.* Puerto Rico had one year to plan and execute continuous service while constructing the new facility. Accordingly, we find that Puerto Rico's decision to wait until nearly one month before the expiration of its permit to begin construction so that it could provide continuous service does not constitute a cause beyond its control. *See also National Beeper, Inc.*, DA 92-625 (Com. Car. Bur. 1992) (lack of funding insufficient grounds for grant of extension where applicants are assumed to be financially qualified); *American Paging, Inc. (Of Florida)*, 1 FCC Rcd 474 (Com. Car. Bur. 1986) (extension rejected where permittee's seven-month inactivity while original antenna site lessor had not made a firm offer was not beyond its control). The MSD was therefore correct in denying Puerto Rico's request for an extension of time.[3]

7. In conclusion, we find that Puerto Rico has failed to demonstrate reversible error by the MSD in its decision below. We therefore affirm the MSD's decision and deny Puerto Rico's petition for reconsideration.

8. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Puerto Rico Telephone Company involving the captioned proceeding IS DENIED.

9. IT IS FURTHER ORDERED that the action of the Mobile Services Division in terminating the captioned authorization of Puerto Rico Telephone Company, File No. 27241-CD-P/L-01-90, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[3] However, the denial of Puerto Rico's extension request does not preclude it from reapplying for another 900 MHz facility in the San Juan market.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4293
Tariff F.C.C. No. 12

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

ORDER

Adopted: August 6, 1992; Released: August 6, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 20, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective August 10, 1992. This transmittal was originally scheduled to become effective August 3, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] This filing introduces Option 112 of AT&T's Virtual Telecommunications Network Service (VTNS) designed and engineered for voice and date communications services.

2. Petitions to reject or, in the alternative, suspend and investigate Transmittal No. 4293 were filed by Sprint Communications Company, L.P. and jointly by Affinity Network, Inc., Business Choice Network, Inc., NOS Communications, Inc., and VNI Communications, Incorporated. On August 3, 1992, AT&T filed a reply to these petitions.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4293, the petitions referenced above, and AT&T's reply. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.[2]

4. Accordingly, IT IS ORDERED that the petitions to reject AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 4293, filed by Sprint Communications Company, L.P. and jointly by Affinity Network, Inc., Business Choice Network, Inc., NOS Communications, Inc., and VNI Communications, Inc., are DENIED.

5. IT IS FURTHER ORDERED that, for the purpose of advancing the effective date of Transmittal No. 4293, Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, are waived and special permission number 92-456 IS ASSIGNED. This filing should be scheduled to become effective on not less than one day's notice.

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration*, 7 FCC Rcd 2677 (1992).

[2] We note with concern, however, the allegations made by the petitioners in their pleadings and in informal contacts with the Common Carrier Bureau that AT&T is engaging in a variety of activities designed to prevent or impede resellers from obtaining Tariff 12 services. These allegations are also the subject of formal complaints before the Commission. We intend to resolve expeditiously the issues raised by these allegations in the context of those proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4292
Tariff F.C.C. No. 12

ORDER

Adopted: August 6, 1992; Released: August 6, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 20, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective August 10, 1992. This transmittal was originally scheduled to become effective August 3, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] This filing introduces Option 111 of AT&T's Virtual Telecommunications Network Service (VTNS) designed and engineered for voice and data communications services.

2. Petitions to reject or, in the alternative, suspend and investigate Transmittal No. 4292 were filed by Sprint Communications Company, L.P. and jointly by Affinity Network, Inc., Business Choice Network, Inc., NOS Communications, Inc., and VNI Communications, Incorporated. On August 3, 1992, AT&T filed a reply to these petitions.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4292, the petitions referenced above, and AT&T's reply. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.[2]

4. Accordingly, IT IS ORDERED that the petitions to reject AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 4292, filed by Sprint Communications Company, L.P. and jointly by Affinity Network, Inc., Business Choice Network, Inc., NOS Communications, Inc., and VNI Communications, Incorporated, are DENIED.

5. IT IS FURTHER ORDERED that, for the purpose of advancing the effective date of Transmittal No. 4292, Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, are waived and special permission number 92-545 IS ASSIGNED. This filing should be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (*IXC Order), reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration*, 7 FCC Rcd 2677 (1992).

[2] We note with concern, however, the allegations made by the petitioners in their pleadings and in informal contacts with the Common Carrier Bureau that AT&T is engaging in a variety of activities designed to prevent or impede resellers from obtaining Tariff 12 services. These allegations are also the subject of formal complaints before the Commission. We intend to resolve expeditiously the issues raised by these allegations in the context of those proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access for
800 Service

ORDER

Adopted: August 6, 1992; Released: August 6, 1992

Comment Date: August 20, 1992
Reply Date: August 31, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On July 10, 1992, Sprint Communications Company (Sprint) filed a petition for declaratory ruling and a request for further proceedings regarding two aspects of 800 data base implementation and administration. Specifically, Sprint requests: (1) that the Commission authorize the administrator of the Number Administration and Service Center (NASC)[1] to make 800 traffic routing and RESPORG changes to the SMS; and (2) that the Commission initiate a rulemaking proceeding to determine an appropriate and acceptable structure and charter for parties responsible for administering and operating the NASC and the SMS, as well as to develop and implement a set of 800 number administration guidelines. In response to Sprint's petition, we establish an expedited pleading cycle to solicit comment on the issue of whether the administrator of the NASC should be authorized to make 800 traffic routing and RESPORG changes to the SMS. However, we deny, without prejudice, Sprint's request for a proceeding to determine an appropriate structure and charter for parties operating the NASC and SMS and to establish 800 number administration guidelines.

II. SPRINT'S PETITION

2. Sprint states that under current 800 data base plans, changes to an 800 customer record will have to be submitted to and implemented by the RESPORG. In Sprint's view, this arrangement raises serious competitive concerns. For example, it states that to switch some or all of a customer's 800 traffic to a new 800 service provider, the customer would have to rely upon its old carrier to implement the change, even though such change would be contrary to the old carrier's interest. Sprint asserts that as a result of this arrangement, the old carrier would be made privy to competitively sensitive information -- such as advance notice that one of its subscribers intends to switch some or all of its traffic to another service provider -- and could possibly use questionable measures to dissuade its customers from leaving.[2] Sprint argues that to offset the inherent anticompetitive consequences of a situation in which the incumbent carrier is tasked with the responsibility for switching traffic to its competitors, the Commission should allow other 800 carriers to designate the NASC administrator as an entity that could implement any changes involving routing of 800 traffic to a carrier other than the RESPORG.[3] Sprint contends that having a neutral entity, such as the NASC administrator, effect customer record changes in situations involving multiple carriers will help to minimize any possible anticompetitive activity.

3. Sprint also argues that the Commission should conduct an inquiry into an appropriate NASC business structure. Such inquiry, it says, is critical to ensure nondiscriminatory administration and oversight of the 800 data base.

III. DISCUSSION

4. We believe that the issue of whether the NASC administrator should be authorized to make 800 traffic routing and RESPORG changes to the SMS is important to resolve quickly because we wish to decide the most significant competitive issues by the time that number portability is implemented. Therefore, we invite interested parties to file comment on this issue by **August 20, 1992** and reply comments by **August 31, 1992**.[4]

5. We believe that Sprint's second request -- that the Commission initiate a rulemaking proceeding to determine an appropriate and acceptable structure and charter for parties responsible for administering and operating the NASC and the SMS, as well to develop and implement a set of 800 number administrative guidelines -- is premature and therefore deny it without prejudice. Currently, these issues are under active discussion within the telecommunications industry. These discussions may result in

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[1] The NASC administers and provides operational support for the 800 Service Management System (SMS). The SMS functions as a centralized data base system that receives routing instructions from the "Responsible Organization" (RESPORG) -- the entity designated to manage and administer an 800 customer's individual data base record -- and disseminates it to each exchange carrier data base. Currently, Bellcore is the administrator of the NASC, although plans are underway to select an administrator to replace Bellcore.

[2] Sprint Petition at 3.

[3] *Id.* at 4.

[4] We note that the Commission has recently taken action to solicit public comment on the related issue, raised by the Competitive Telecommunications Association (Comptel), of whether any entity may act as a RESPORG on behalf of a provider of interstate 800 services, whether or not that entity or the service provider is a purchaser of 800 access. *See* Public Notice Establishing Pleading Cycle For Competitive Telecommunications Association's Petition for Expedited Declaratory Ruling Regarding Issues Associated With Implementation of 800 Data Base System, CC Docket 86-10, DA 92-848 (Released June 26, 1992). Comments were filed on July 10, 1992, and reply comments were filed on July 17, 1992.

an industry consensus on those issues and we wish to allow sufficient time for a consensus to develop. Moreover, Sprint itself acknowledges that these issues are not in need of immediate resolution.[5] Given the many issues in this proceeding that require more immediate attention, we do not believe it would be prudent to redirect the Commission or industry resources by seeking comment on this issue at this time. We do, however, expect that the industry will continue to work through this and the other issues entailed in reliably implementing the 800 data base system in March 1993.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that Sprint's petition IS GRANTED to the extent indicated herein, and otherwise IS DISMISSED WITHOUT PREJUDICE.

7. IT IS FURTHER ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91, 0.291, that COMMENT IS INVITED in this proceeding.

8. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before August 20, 1992 and reply comments SHALL BE FILED with the Secretary on or before August 31, 1992. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to recieve a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W. Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, The Downtown Copy Center, 1114 21st Street, N.W., Washington D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the Docket Reference Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[5] Sprint Petition at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Procedure for measuring electromagnetic emissions from digital devices, intentional, and unintentional radiators.	**GEN Docket Nos. 89-116 89-117 89-118**

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1992; Released: August 17, 1992

By the Commission:

1. By this action, the Commission is proposing to use a test procedure developed by the American National Standards Institute for the measurement of emissions from certain radio frequency devices authorized under Part 15 of the Rules. Specifically, we propose to incorporate into Part 15 of the Rules by reference, ANSI C63.4-1992, entitled "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz." ANSI C63.4-1992 is an industry consensus standard for testing such devices. This action supersedes the previous Notices of Proposed Rule Making in the above captioned dockets and combines these proceedings into the instant proceeding.[1]

INTRODUCTION

2. In the *First Report and Order* in General Docket 87-389 the Commission, inter alia, adopted new classifications for non-licensed radio frequency (RF) devices permitted to operate under Part 15 of the rules.[2] Two of these classes are intentional radiators, which intentionally generate and emit radio frequency energy by radiation or induction, and unintentional radiators, which generate radio frequency energy, but are not intended to emit RF energy by radiation or induction. Examples of intentional radiators include remote control transmitters, walkie talkies, cordless telephones, auditory assistance devices, and wireless microphones. Examples of unintentional radiators include radio and TV receivers, TV interface devices such as VCRs, and cable system terminal devices.

3. In Docket 87-389, the Commission revised a number of technical standards that apply to intentional and unintentional radiators, including limits on permissible RF emissions from such devices. The Commission also specified certain requirements for measuring RF emissions from such devices for the purpose of determining compliance with the rules. For example, the rules were amended to specify the use of instrumentation with peak, average, and quasi-peak detector functions, extend the range of frequencies to be measured to include frequencies above 1000 MHz, standardize the range of the scan height of the measuring receiver antenna at 1 to 4 meters, and establish the measurement distance for most intentional and unintentional radiators at 3 meters. These requirements are contained in Sections 15.31, 15.33 and 15.35 of the Commission's Rules.

4. While Part 15 provides general guidance on the procedures for testing equipment, the Commission recognized that more detailed procedures would be needed for testing certain categories of equipment or types of products. Therefore, the Commission proposed four procedures for testing Part 15 devices.[3] The procedures were for testing: 1) intentional radiators (designated TP-3); 2) unintentional radiators (designated TP-4); 3) digital devices (designated TP-5); and, 4) transmitters with periodic operation and superregenerative receivers (designated TP-6), which are special classes of intentional and unintentional radiators.

5. A total of 18 parties, consisting of individuals, trade associations, equipment manufacturers, and test firms filed comments on the proposed procedures TP-3, TP-4, and TP-6. One party filed reply comments. A list of the parties filing comments and reply comments is contained in Appendix A. Overall, the comments were supportive of the proposals. However, several commenting parties had recommendations for clarifying the procedures for making certain specific measurements.

DISCUSSION

6. We recently completed the proceeding addressing measurement procedures for digital devices.[4] In this proceeding, the Commission, after initially proposing to adopt its own test procedure for measuring RF emissions from digital devices (TP-5), ultimately adopted instead a measurement procedure developed jointly by the FCC and industry through the auspices of the American National Standards Institute (ANSI). Specifically, the Commission incorporated by reference ANSI C63.4-1991 into Part 15 as the procedure the Commission will use for testing digital devices.

7. The procedures we proposed for measuring RF emissions from intentional and unintentional radiators were similar to those for digital devices. This is due to the fact that the same basic test equipment and procedures are used for measuring radiated and line conducted emissions from any device. Consistency in test procedures for different devices ultimately saves time and money by eliminating multiple test set-ups required by differing test procedures or requirements. The C63 Committee recognized the opportunity to broaden the applicability of its standard, and thus proceeded to modify ANSI C63.4-1991 by incorporating additional sections for measurements on intentional and unintentional radiators (including transmitters with periodic operation and superregenerative receivers). To ensure adequate representation from manufacturers of intentional and unintentional radiators, the C63 Committee invited all parties commenting in the instant proceedings to participate. This effort culminated in a new standard, ANSI C63.4-1992, that was recently approved under ANSI's public review process.

8. In developing the new standard, the C63 Committee considered the issues raised in the comments on the FCC proposals, such as test site requirements, equipment configuration, measurement of pulsed emissions, occupied bandwidth, transfer switch isolation measurements, etc. The test methods contained in the new standard represent a balanced state-of-the-art measurement procedure that appears to have broad-based industry support. In order to broaden the scope of ANSI C63.4-1991, two new sections

containing specific information on testing intentional and unintentional radiators were added. The new section on intentional radiators specifies procedures for measuring AC powerline conducted and radiated emissions, transmitter operating frequency, and frequency variation with respect to voltage and temperature. For intentional radiators that transmit pulsed emissions and are subject to average limits, a procedure is provided for measuring the transmitter duty cycle. The new section on unintentional radiators specifies procedures for measuring AC powerline conducted and radiated emissions, output signal levels from TV interface devices, and isolation between antenna transfer switch ports.

9. In view of these considerations, we are proposing to amend Part 15 of the Rules to incorporate by reference ANSI C63.4-1992 as the procedure to be used by the Commission for performing radio-noise emission measurements on intentional and unintentional radiators, as well as digital devices. This action is consistent with the intent of Office of Management and Budget (OMB) Circular A-119, which urges government agencies to use industry developed standards rather than develop their own. We are unaware of any internationally recognized test procedures for intentional radiators. However, ANSI C63.4-1992 is consistent with measurement methods prescribed internationally for unintentional radiators, such as digital devices. To this extent, FCC implementation of this standard may advance the acceptance of U.S. products and test data internationally. Further, it should help advance United States leadership in future international standards developments for intentional and unintentional radiators.

10. Consistent with the actions we have taken earlier with regard to digital devices, there are three sections of ANSI C63.4-1992 that we are not proposing to adopt in determining compliance of devices with the FCC Rules. We are not proposing to adopt Section 5.7, which specifies the use of an artificial hand when measuring hand-held equipment. We believe that the use of an artificial hand adds complexity to testing, and there is insufficient evidence to show that it allows an accurate or repeatable measurement of the emission levels from a device. We also would not accept absorbing clamp measurements as a substitute for measuring radiated emissions as provided in Section 9. The Commission's limits are based on measurements of radiated emissions. There is no evidence to show that the results obtained with an absorbing clamp can be correlated with radiated emissions from electronic equipment. Finally, we do not propose the relaxation of the limits for "click" or short duration emissions as provided in Section 14. Short duration emissions can produce as much nuisance to radio communications as continuous emissions.

11. We are also proposing to adopt the test site performance criteria in ANSI C63.4-1992. Specifically, we are proposing to amend Section 2.948 to require submission of both horizontal and vertical site attenuation data showing compliance with the performance criteria in ANSI C63.4-1992 for test sites used to perform measurements on intentional, and unintentional radiators. We believe this will have little impact because most test facilities used for measuring intentional and unintentional radiators are already used for measurements on digital devices.

12. The test procedure for digital devices in ANSI C63.4-1992 is largely the same as C63.4-1991. The most substantial change is that the use of a conductive wall behind the equipment under test during AC line conducted emission testing is optional rather than mandatory when measurements are performed on an open field test site. In addition, a section on the antenna positioner for radiated testing has been added. These changes will have little, if any, impact on parties making measurements on digital devices. We believe that it would be preferable for most laboratories to have available a single document that covers testing of digital devices, as well as intentional and unintentional radiators. We, therefore, also solicit comments on the use of C63.4-1992 for digital device testing to the extent that it differs from C63.4-1991.

13. While ANSI C63.4-1992 covers measurement procedures for most Part 15 devices, we observe that certain measurements have not been addressed. Specifically, it does not include procedures for measuring radiated emissions below 30 MHz, or for measurements on spread spectrum transmitters. These two areas present technical issues that are not yet completely resolved. Additional procedures addressing these areas may be added to C63.4 in the future. We note that our proposals did not address such measurements. Until such time as specific measurement procedures are developed, we will apply only the general measurement guidance currently contained in Sections 15.31 through 15.35 of the FCC Rules.

14. We recognize that a time period for transition to the new measurement procedure and test site requirements is necessary. Therefore, we propose to implement the use of C63.4-1992 for equipment authorization applications, other than digital devices, filed on or after two years from the date C63.4-1992 is incorporated by reference into the rules by the Commission. Digital devices would still be subject to the transition provisions set forth in the *Report and Order* in Docket 89-44.[5]

PROCEDURAL MATTERS

15. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before (*75 days after publication in the Federal Register*), and reply comments on or before (*105 days after publication in the Federal Register*). All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554. A copy of C63.4-1992 has been placed in the docket binder for this proceeding and is available for inspection with the comments and reply comments. Additional copies of ANSI C63.4-1992 may be obtained for a fee from:

IEEE Standards Department
445 Hoes Lane
P.O. Box 1331
Piscataway, NJ 08855-1331
Phone: (908) 981-1393

16. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or, (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

17. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.12.2(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

18. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation. Section 1.1206.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

19. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's initial analysis is as follows:

I. Reason for action:

The *First Report and Order* in Docket 87-389 changed the technical standards in Part 15 of the Commission's Rules for unlicensed RF devices, now classified as intentional and unintentional radiators. The existing measurement procedures used to evaluate devices are not satisfactory for evaluating devices under the revised rules. Adoption of a new measurement procedure is believed necessary in order to provide more specific information on how the Commission will test such devices. We believe it is necessary to incorporate the test procedure into the Rules by reference to provide adequate notice to the public of the procedure which will be used by the Commission.

II. Objectives:

Our objective in proposing these changes is to adopt a test procedure which will produce repeatable results in testing intentional and unintentional radiators. By providing guidance on how the Commission tests these devices, it is hoped that the compliance rate for these devices will be increased. Also, we wish to provide an opportunity for industry to comment on the proposed changes.

III. Legal basis:

The actions proposed herein are taken pursuant to the authority contained in Sections 4(i), 301, 302 and 303 of the Communications Act of 1934, as amended.

IV. Reporting, record keeping and other compliance requirements:

Parties performing measurements for certification of digital devices, intentional and unintentional radiators will be subject to a new requirement to file horizontal and vertical site attenuation data of their measurement facility which shows conformance with the criteria of ANSI C63.4-1992. The information that must be submitted is similar to the current information requirement to submit only horizontal site attenuation data taken pursuant to Office of Engineering and Technology Bulletin 55 (OET 55) using tuned dipole antennas. Although twice the originally-required information will be collected, the new procedure simplifies the collection process so the new information can be collected in the same time as the originally-required information. The new information is needed to provide additional information on test site performance to ensure repeatable test results. No other changes in reporting or record keeping requirements are proposed.

The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collection requirement on businesses using open field test sites to test RF emissions from intentional and unintentional radiators. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. Federal rules which overlap, duplicate or conflict with this rule:

None.

VI. Description, potential impact and number of small entities affected:

The proposed changes will potentially affect all manufacturers of digital devices, intentional and unintentional radiators, and laboratories performing certification and verification tests on such devices, but the exact number of small entities affected is not known. It is believed that clarification and simplification of the test procedure will

benefit manufacturers and test laboratories by speeding testing and reducing compliance costs. Additionally, increasing the compliance rate for devices tested at the Commission's Laboratory will allow manufacturers to obtain approval for new products more quickly, and therefore to market them more quickly.

VII. Any significant alternatives minimizing impact on small entities consistent with stated objectives:

None.

20. For further information on this proceeding, contact Mr. Hugh L. Van Tuyl at the FCC Laboratory, 7435 Oakland Mills Road, Columbia, MD 21046, (301) 725-1585, extension 221.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PARTIES FILING COMMENTS TO TP-3 PROPOSAL

Acronym	Party
ADEMCO	Alarm Device Manufacturing Company
Amador	Amador Corporation
AMST	Association of Maximum Service Telecasters
AT&T	American Telephone and Telegraph Company
Compaq	Compaq Computer Corporation
DORCMA	Door Operator and Remote Controls Manufacturers Association
DS&G	Dash, Straus & Goodhue
Electro	Electro-Metrics
GM	General Motors Research Corporation
GTE	GTE Service Corporation
Hughes	Hughes Network Systems
Linear	Linear Corporation
NAB	National Association of Broadcasters
Senstar	Senstar Corporation
SMC	Spectrum Measurement Corporation

PARTIES FILING REPLY COMMENTS TO TP-3 PROPOSAL

Acronym	Party
AMST	Association of Maximum Service Telecasters

PARTIES FILING COMMENTS TO TP-4 PROPOSAL

Acronym	Party
AMST	Association of Maximum Service Telecasters
AT&T	American Telephone and Telegraph Company
Compaq	Compaq Computer Corporation
DS&G	Dash, Straus & Goodhue
EIA	Electronics Industries Association
Electro	Electro-Metrics
GTE	GTE Service Corporation
Linear	Linear Corporation
NAB	National Association of Broadcasters
SMC	Spectrum Measurement Corporation
Thomson	Thomson Consumer Electronics, Inc.
Zenith	Zenith Electronics Corporation

PARTIES FILING REPLY COMMENTS TO TP-4 PROPOSAL

Acronym	Party
AMST	Association of Maximum Service Telecasters

PARTIES FILING COMMENTS TO TP-6 PROPOSAL

Acronym	Party
AMST	Association of Maximum Service Telecasters
ADEMCO	Alarm Device Manufacturing Company
AT&T	American Telephone and Telegraph Company
Compaq	Compaq Computer Corporation
DORCMA	Door Operator and Remote Controls Manufacturers Association
DS&G	Dash, Straus & Goodhue
Electro	Electro-Metrics
GTE	GTE Service Corporation
Linear	Linear Corporation
NAB	National Association of Broadcasters
SMC	Spectrum Measurement Corporation

PARTIES FILING REPLY COMMENTS TO TP-6 PROPOSAL

Acronym	Party
AMST	Association of Maximum Service Telecasters

APPENDIX B

A. Part 2 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 2 would continue to read as follows:

Authority: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.948, paragraph (b), would be amended by revising paragraph (8) to read as follows:

Section 2.948 Description of measurement facilities.

(b) * * *

* * * * *

(8) A plot of site attenuation data.

(i) For a measurement facility that will be used for testing radiated emissions from a digital device for certification or verification on or after May 1, 1994, or for testing intentional and other unintentional radiators authorized under Part 15 of the rules for certification or verification on or after **[two years from adoption date],** the site attenuation data shall be taken pursuant to the procedures contained in Sections 5.4.6 through 5.5 of the following procedure: American National Standards Institute (ANSI) C63.4-1992, entitled "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz," published by the Institute of Electrical and Electronics Engineers, Inc. on July 17, 1992 as document number SH15180. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of ANSI C63.4-1992 may be obtained from: IEEE Standards Department, 455 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331, Telephone 1-800-678-4333. Copies of ANSI C63.4-1992 may be inspected at the following locations: (1) Federal Communications Commission, 1919 M Street, N.W., Dockets Branch (Room 239), Washington, DC. (2) Federal Communications Commission Laboratory, 7435 Oakland Mills Road, Columbia, MD, or (3) Office of the Federal Register, 800 North Capitol St., N.W., Suite 700, Washington, DC.

(ii) For a measurement facility that will be used for testing radiated emissions from a digital device prior to May 1, 1994, or from intentional and other unintentional radiators authorized under Part 15 prior to **[two years from adoption date],** or for devices authorized under Part 18 of the rules, the site attenuation data shall be taken pursuant to either ANSI C63.4-1992, Sections 5.4.6 through 5.5, or FCC/OET Bulletin 55. See above paragraph (Section 2.948(b)(8)(i)) for more information on ANSI C63.4-1992.

(iii) This requirement does not apply to equipment that is not measured on an open field test site.

* * * * *

B. Part 15 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 15 would continue to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, 304, and 307.

2. Paragraph (a) of Section 15.31 would be revised to read as follows:

Section 15.31 Measurement standards.

(a) The following measurement procedures are used by the Commission to determine compliance with the technical requirements in this Part. Except where noted, copies of these procedures are available from the Commission's current duplicating contractor whose name and address are available from the Commission's Consumer Assistance Office at 202-632-7000.

(1) FCC/OET MP-2: Measurement of UHF Noise Figures of TV Receivers.

(2) FCC/OET MP-4 (1987): FCC Procedure for Measuring RF Emissions from Computing Devices. Note: This procedure may be used only for testing digital devices for which verification is obtained or an application for certification is filed before May 1, 1994. For compliance testing of digital devices on or after May 1, 1994, see 15.31(a)(3) below.

(3) Digital devices for which verification is obtained, or an application for certification is filed, on or after May 1, 1994, and intentional and other unintentional radiators, for which verification is obtained, or an application for certification filed, on or after **[two years from adoption date]** are to be measured for compliance using the following procedure excluding Section 5.7, Section 9 and Section 14: American National Standards Institute (ANSI) C63.4-1992, entitled "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz," published by the Institute of Electrical and Electronics Engineers, Inc. on July 17, 1992, as document number SH15180. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. The Commission encourages the use of this procedure for testing digital devices, intentional radiators, and other unintentional radiators as soon as practical. Copies of ANSI C63.4-1992 may be obtained from: IEEE Standards Department, 455 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331, Telephone 1-800-678-4333. Copies of C63.4-1992 may be inspected during normal business hours at the following locations: (1) Federal Communications Commission, 1919 M Street, N.W., Dockets Branch (Room 239), Washington, DC. (2) Federal Communications Commission Laboratory, 7435 Oakland Mills Road, Columbia, MD, or (3) Office of the Federal Register, 800 North Capitol St., N.W., Suite 700, Washington, DC.

* * * * *

FOOTNOTES

[1] See *Notice of Proposed Rule Making* in General Docket No. 89-116, 4 FCC Rcd 5110 (1989) proposing to adopt TP-3; *Notice of Proposed Rule Making* in General Docket No. 89-118, 4 FCC Rcd 5143 (1989) proposing to adopt TP-4; and *Notice of Proposed Rule Making* in General Docket No. 89-117, 4 FCC Rcd 5174 (1989) proposing to adopt TP-6.

[2] See *Report and Order* in General Docket 87-389, 4 FCC Rcd 3493 (1989).

[3] See n.1, *supra*. See also *Notice of Proposed Rule Making* in General Docket 89-44, 4 FCC Rcd 2113 (1989).

[4] See *Report and Order* in General Docket 89-44, 7 FCC Rcd 3128 (1992).

[5] See n.4, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO LETTER 21

Released: August 7, 1992

Responsible Accounting Officer

Re: Classification of Remote Central Office Equipment for

Accounting Purposes.

It has come to our attention that recent technological advances in telecommunications have significantly increased the use of remote switches. We believe, however, that some carriers are improperly classifying these switches as circuit equipment rather than central office switching, under Part 32. The inconsistency in classifying these switches appears to be the result of confusion between remote switches and concentrators, the latter of which are properly classified as circuit equipment under Part 32. In order to increase uniformity in the Part 32 classification of remote switches, we are issuing definitions in this letter to differentiate between remote switches and concentrators.

Remote Switch: A unit that performs some, but not necessarily all, of the basic switching functions.[1] The remote switch may be wholly or partially controlled by a control unit or processor located in another switch, i.e., the "host" switch. The remote switch may depend on the host switch for such functions as routing, billing, traffic measurement and custom calling. Calls between subscribers served by the same remote can be switched by the remote. When this occurs, the voice or data path does not extend to the host switch; however, a link to the host switch may be maintained for call control purposes. A remote switch may be able to switch calls between subscribers it serves when the control link to the host switch fails.[2] The Commission's rules require that the cost of remote switches be included in Account 32.2211, Analog electronic switching, or Account 32.2212, Digital electronic switching.[3]

Remote Concentrator: A unit that consolidates subscriber lines. This equipment facilitates the use of lesser amounts of loop plant to serve a greater number of end users. All calls are switched by the central office switch to which the remote concentrator is connected. The voice or data path will always extend to the host switch even for calls between subscribers served by the same remote concentrator. If the voice or data path or control link between the central office and the remote concentrator fails, all service to those subscribers served by the remote concentrator will be interrupted until the failed link is restored. The Commission's rules require that the cost of equipment used to reduce the amount of loop plant otherwise required to serve a given number of subscribers by utilizing carrier systems, concentration stages or combinations of both is to be included in Account 32.2232, Circuit equipment.[4]

The distinguishing attribute between a remote switch and a remote concentrator is that a remote switch can switch calls between the subscribers it serves either routinely or if the voice or data path or control link to the host switch fails. Thus, for calls between subscribers served by the same remote switch, the remote switch's voice or data path does not always extend to the host switch. A remote concentrator, however, depends on the host switch to switch all calls, and the voice or data path will always extend to the host switch.[5]

This letter is issued pursuant to authority delegated under §0.291 of the Commission's Rules, 47 C.F.R. §0.291. Applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §1.115, must be filed within 30 days of the date of this letter. *See* 47 C.F.R. §1.4(b)(2).

If you have any questions, please contact Gary Seigel at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

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[1] The basic switching functions are: 1) *Attending* - monitors for off-hook signals; 2) *Control* - determines call destination and assigns call to available line or trunk; 3) *Busy testing* - determines whether the called line/trunk is busy; 4) *Information receiving* - receives control and busy test results; 5) *Information transmitting* - transmits control and busy test results to tell the alerting and interconnection functions whether to complete the call; 6) *Interconnection* - connects subscriber line to subscriber line or subscriber line to trunk; 7) *Alerting* - rings the called subscriber's line or other signalling means if the call is destined for another exchange; 8) *Supervising* monitors for call termination so the line can be released. *See, e.g., Telecommunication System Engineering*, Second Edition, Roger L. Freeman, Wiley Interscience, 89-90 (1989).

[2] *See BOC Notes on the LEC Networks-1990*, Issue 1, March 1991.

[3] *See* 47 C.F.R. §§32.2211-32.2212. Class B companies would record these costs in Account 32.2210, Central office-switching. *See* 47 C.F.R. §32.2210.

[4] *See* 47 C.F.R. §32.2232. Class B companies would record these costs in Account 32.2230, Central office-transmission. *See* 47 C.F.R. §32.2230.

[5] *See Telecommunication System Engineering*, Second Edition, Roger L. Freeman, Wiley Interscience, 120 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
The Hearst Corporation

Licensee of Radio Station
WIYY(FM), Baltimore, MD

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: August 7, 1992; Released: August 14, 1992

By the Chief, Mass Media Bureau

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $2,500 Notice of Apparent Liability (NAL) issued April 27, 1992, to the Hearst Corporation, (Hearst), licensee of Station WIYY, Baltimore, Maryland; and (2) Hearst's response to the NAL dated May 19, 1992.

2. The NAL was issued for an apparent violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules based on the following facts. In January 1990 Station WIYY broadcast commercials promoting a Superbowl party that was being promoted by the Wise snack food company and "Ball's the All American Bar" (Ball's). The party was to be held at Ball's, in Baltimore, MD. Patrons paid a $20.00 admission charge which entitled them to food, beverage, entertainment and a ticket for a random drawing to win a mountain trail bike and a weekend get-away at Days Inn. Licensee's counsel wrote to the Commission, acknowledging that WIYY had "inadvertently" run twelve commercial spots promoting a lottery from January 22 through 28, 1990. Thereafter, a written complaint was filed alleging the same violation.

3. Hearst's response to the NAL asks the Commission to issue a finding of no violation of the lottery broadcast rule, or in the alternative, to issue a letter of admonishment, rather than impose a forfeiture. Hearst presents two arguments. First, although counsel for Hearst had previously reported to the Commission that WIYY had inadvertently broadcast commercials which "advertised a lottery," Hearst now states that "we believe upon review of the facts that the contest may not, in fact, have constituted a lottery." Second, Hearst presents as "mitigating factors" the belief that the NAL appeared to have been issued only after a third party filed a complaint, following Hearst's disclosure to the Commission concerning the broadcasts, and the NAL was issued over two years after the subject broadcasts occurred.

4. In support of its first argument, Hearst suggests that consideration may not have been present in the promotion because the prizes may have been furnished to Ball's free of charge. Hearst cites *Greater Indianapolis Broadcasting Co.*, 44 FCC 2d 37 (1973), to argue that consideration is present only when it flows to a promoter. Ball's was clearly a promoter of the advertised event in which only paying customers could participate. Whether or not Ball's paid for the prizes that it randomly awarded to patrons who paid to enter its establishment is irrelevant to the question of who the promoter was. Ball's provided the location, food, drink, personnel and advertisements in its role as promoter of the event.

5. Hearst's second argument is that a forfeiture should not be issued because the Commission appears to have issued the NAL only after receiving a written complaint concerning the violation that Hearst had previously reported. Hearst argues that because the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* FCC 92-212 (released June 4, 1992) does not refer to receiving complaints, an admonition is a more appropriate sanction. This argument is without merit and is irrelevant to the Commission's authority to issue forfeitures. Additionally, the *Policy Statement* addresses factors to be used in assessing forfeiture amounts. We note that the base amount for a lottery violation using factors listed in the *Policy Statement* is $6,250, so the amount of WIYY's NAL had already been mitigated, as described more fully in the NAL. Finally, the fact that the violation occurred approximately twenty-seven months before the issuance of the NAL is not cause for further mitigation and does not preclude the Commission from issuing a forfeiture. 47 C.F.R. Section 503(b)(6)(A)(ii).

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that the Hearst Corporation, licensee of Radio Station WIYY(FM), Baltimore, Maryland, FORFEIT to the United States of America the sum of Two Thousand Five Hundred Dollars ($2,500) for the willful and repeated violation of 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211, which occurred from January 22, 1990, through January 28, 1990. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS
COMMUNICATIONS, INC.,
Complainant,

v.

GTE SOUTHWEST, INC., File No. E-91-27
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: August 7, 1992; Released: August 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On October 29, 1990, Cable & Wireless Communications, Inc. ("Cable & Wireless") filed with the Commission the above-captioned formal complaint against GTE Southwest, Inc. ("GTE") seeking recovery of damages for GTE's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, GTE filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On July 28, 1992, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

4. IT IS FURTHER ORDERED that Cable & Wireless' Application for Review filed in the above-captioned proceeding IS DISMISSED.

[1] Cable & Wireless filed an application for review of an order holding the above-captioned proceeding in abeyance. *Order* 6 FCC Rcd 697 (Com.Car.Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P.,
Complainant,

v.

THE BELL TELEPHONE COMPANY
of PENNSYLVANIA,
Defendant.

File No. E-90-270

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: August 7, 1992; Released: August 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Charter Network Company, L.P. ("Charter") filed the above-captioned complaint against The Bell Telephone Company of Pennsylvania (defendant) seeking damages resulting from the defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On July 24, 1992, the defendant requested that the complaint be dismissed on the grounds that Charter had not purchased interstate access services from them during the relevant monitoring period. On August 4, 1992, Charter filed a reply to defendant's motion to dismiss, stating that although it does not agree that it did not take service, it does not oppose dismissal of the complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the defendant's request for dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that Charter's Application for Review filed in the above-captioned proceeding IS DISMISSED.

[1] Charter filed an application for review of an order holding the above-captioned proceeding in abeyance. *Order*, 6 FCC Rcd 643 (Com.Car.Bur. 1991). Because the underlying dispute has been resolved by dismissal of the complaint, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington D.C. 20554

PUBLIC NOTICE

Released: July 30, 1992

COMMISSION REQUESTS FURTHER COMMENTS IN THE MATTER OF THE ASSOCIATION OF COLLEGE AND UNIVERSITY TELECOMMUNICATIONS ADMINISTRATORS' PETITION FOR CLARIFICATION REGARDING CLASSIFICATION AS "CALL AGGREGATORS"

The Commission hereby requests further comments regarding the Petition for Clarification filed by the Association of College and University Telecommunications Administrators, the American Council on Education, and the National Association of College and University Business Officers (collectively the "Higher Education Parties"). The Higher Education Parties request that the Commission clarify that colleges and universities are "call aggregators" only with respect to pay telephones on their campuses. In a Public Notice released March 2, 1992, 7 FCC Rcd 1926 (1992), the Commission invited comments and reply comments on the petition.

The Commission requests further information concerning the petition. In particular, parties should address specifically financial difficulties and other hardships in complying with the unblocking requirements adopted in the Commission's *Report and Order* in CC Docket 90-313, 6 FCC Rcd 2744 (1991). Relevant factors that commenters should address include the type of equipment currently in use, estimated costs to modify or replace equipment to comply with the unblocking requirements, the size of the institution, and the public/private or non-profit/for-profit status of the institution. Also relevant would be information on the revenues recovered by colleges and universities from their telephone systems and whether the level of such revenues should affect their unblocking obligations. Finally, we seek comment on how callers in dormitory rooms will be ensured access to their carrier of choice and informed of their rights, if the petition is granted.

Parties wishing to comment on this matter may do so not later than **August 20, 1992.** Reply comments should be filed by **September 4, 1992.** All filings concerning this matter should refer to File No. ENF-92-03. A copy of the petition for clarification and any subsequently filed documents in this matter may be obtained from the Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036 (202) 452-1422. The petition and documents are also available for inspection and copying in the Public Reference Room, Plaza Level, 1250-23rd Street, N.W., Washington, D.C. 20554. For further information, contact David Meyers at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff
Contract Tariff Transmittal No. 45
F.C.C. No. 20

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

ORDER

Adopted: August 10, 1992; Released: August 10, 1992

By the Chief, Common Carrier Bureau:

1. On July 28, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective August 11, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 20 for AT&T Software Defined Network (SDN) Service.

2. On August 4, 1992 MCI Telecommunications Corporation (MCI) and Sprint Communications Company Limited Partnership (Sprint) filed petitions to reject or suspend and investigate Contract Tariff Transmittal No. 45.

3. The Common Carrier Bureau has reviewed AT&T Contract Tariff 20, Contract Tariff Transmittal No. 45 and the appropriate pleadings. We conclude that this transmittal must be rejected because it is inconsistent with the Commission's decision in CC Docket No. 90-132 "that, until 800 number portability is available, future bundling by AT&T of any service with 800 or inbound service using 'old' 800 numbers is an unlawful practice under section 201(b) of the Communications Act.[2] Contract Tariff 20 does not exclude inbound calling features normally associated with SDN Service, such as Network Remote Access Express, yet AT&T has not supplied the affidavit required by the Commission's *Further Reconsideration* in CC Docket No. 90-132 for contract tariffs that bundle inbound or 800 service.[3] Contract Tariff Transmittal 45 therefore violates the requirements of the Commission's *Further Reconsideration* in CC Docket No. 90-132.

4. Accordingly, IT IS ORDERED that AT&T Contract Tariff F.C.C. No. 20, Contract Tariff Transmittal No. 45, IS REJECTED.

5. IT IS FURTHER ORDERED that the petitions to reject or suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 20, Contract Tariff Transmittal No. 45, filed by MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership ARE GRANTED.

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992) (*Further Reconsideration*).

[2] *Further Reconsideration*, 7 FCC Rcd at 2679.

[3] *Id.* at 2680-81.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Fourth Media File No. ENF-92-01

Apparent Liability for Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: July 30, 1992; Released: August 17, 1992

By the Commission:

I. INTRODUCTION

1. By this Notice of Apparent Liability (NAL), we initiate enforcement action against Fourth Media, a provider of adult entertainment telephone messages, for apparent violations of Section 223(b) of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 223(b).[1] Section 223(b), which regulates the provision of obscene and indecent telephone messages, states in pertinent part that parties who knowingly and for commercial purposes, by means of telephone, transmit obscene communications, or make indecent communications available to minors without restriction, will be subject to certain penalties.[2] For the reasons discussed below, we have determined that Fourth Media is apparently liable for a forfeiture in the amount of $350,000 for the violations.

II. THE COMMISSION'S INVESTIGATION

2. On September 9, 1991, the Commission's Common Carrier Bureau (Bureau) received information from an anonymous caller indicating that three (800) numbers, subsequently determined to be leased by Fourth Media from MCI Telecommunications Corporation, were being used to provide unrestricted, sexually explicit recorded telephone messages, in possible violation of the Communications Act and Commission rules and policies. Commission staff subsequently telephoned the three numbers and confirmed the sexually explicit content of the messages. At the Bureau's request, the Commission's Field Operations Bureau (FOB) telephoned Fourth Media's message service at various times between September 18, 1991, and October 9, 1991, and recorded the messages that it accessed.[3] In all cases, the messages were readily accessible to the Bureau and FOB staff members and by inference, to any other caller regardless of the caller's age. In no instance did the message provider require an access code or credit card number before the messages were transmitted, or use any other effective method to restrict access by minors.

2. The Fourth Media messages provided over the (800) numbers and recorded during the investigation all contain a sample of what appears to be Fourth Media's subscription dial-aporn service. The sample is apparently intended to solicit customers for the dial-a-porn service. Fourth Media preceded and followed its dial-a-porn sample with the following language:

> Thank you for calling the Gem Network. There's no charge for this call. In a moment, you'll be connected to our exciting new Showtime Service line. You'll get to sample five minutes of this service absolutely free. So please hold while we connect you.
>
> [Five-minute dial-a-porn sample message.][4]
>
> We hope you've enjoyed this sample. To find out how you can enjoy this service at any time, just call the same 1-(800) number again. One of our operators will start your own personal Gem Network charge account. And you'll receive the first $100 of calls free.[5]

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[1] Section 223(b) was amended by Congress in 1989 to reflect the constitutional concerns expressed by the Supreme Court in *Sable Communications v. FCC*, 492 U.S. 115, 109 S. Ct. 2829 (1989). *See* Labor Health and Human Services Appropriations Act, Pub. L. No. 101-166, §521(i), *reprinted in* 1989 U.S. Code Cong. & Admin. News, 103 Stat. 1159, 1192-94 (1989).

[2] Section 223(b) states in part:

> (1) Whoever knowingly --
>
> (A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined in accordance with Title 18, United States Code, or imprisoned not more than two years, or both.
>
> (2) Whoever knowingly --
>
> (A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),
>
> shall be fined not more than $50,000 or imprisoned not more than six months, or both.
>
> 47 U.S.C. § 223(b).

[3] *See* Appendix for a precise record of the dates and times of FOB's calls.

[4] Tapes and transcripts of Fourth Media's dial-a-porn messages, as recorded by FOB, are on file at the Commission in the Common Carrier Bureau.

[5] We note further that Fourth Media's system appears to identify and store each calling number and automatically switch

Under these circumstances, it is clear that the messages were transmitted in connection with a business enterprise and, therefore, were "for commercial purposes" within the meaning of Section 223(b).

4. It is equally clear to this Commission that the numerous messages transmitted by Fourth Media as samples of its dial-a-porn subscription service that were recorded by the FOB are obscene within the meaning of Section 223(b) and prevailing Supreme Court precedent.[6] Applying the three criteria of the *Miller* definition to the messages at issue in this proceeding, we first determine that, taken as a whole, the messages appeal to the prurient interest of the average person.[7] Second, we find that, taken as a whole, they include numerous distinctive characterizations of sexual acts or organs, describe various methods of sexual intercourse (including anal, vaginal, and oral), and depict or describe, in a patently offensive way, the "hard core" sexual conduct specified by the Supreme Court in the *Miller* case.[8] Most, if not all, of the messages recorded during the Commission's investigation explicitly describe sexual acts in a patently offensive manner. The descriptions are highly vulgar and degrading and appear to us to be patently offensive and to go well beyond what an average adult person in any community would consider to be portrayals of sexual conduct worthy of protection. Third, we find that no reasonable person would conclude that the messages have any serious literary, artistic, political or scientific value. Accordingly, the recorded messages appear, in our view, to be obscene within the meaning of the *Miller* definition.

5. We have evaluated both the transcripts of the recorded messages and the audio presentations of the messages themselves in making our evaluation in this case. Each presentation contains verbal inflections, such as heavy breathing and screams, clearly intended to portray hard core sexual activity. As noted above, we find that the descriptions are obscene. Thus, we conclude that, by providing these messages via telephone, Fourth Media has apparently violated Section 223(b)(1) of the Act.

6. Even if it could be argued that the recorded messages do not fall within the definition of obscenity as contemplated by Section 223(b)(1), we find the messages to be indecent under Section 223(b)(2) and Supreme Court and Commission precedent.[9] Indecent speech is a broader, less restricted category of speech.[10] Speech is considered indecent if it describes sexual or excretory activities and organs in patently offensive terms.[11] It need not depict or describe the type of "hard core" sexual conduct specified in *Miller*.

7. One of the principal goals of Section 223(b) is the protection of children from exposure to sexually explicit communications on the nation's telephone network.[12] The Commission has previously stated that "the concept of indecency is intimately connected with the exposure of children to material that most parents regard as inappropriate for them to hear.[13] Section 223(b)(3) of the Act strikes a balance between the goal of protecting children from exposure to indecent speech and the rights of consenting adults by requiring message providers to employ effective means to block access by minors to such communications while enabling adults to access the adult messages if they so desire. Section 64.201 of the Commission's Rules specifies three different blocking techniques that the Commission has determined will operate as defenses to prosecution under subsection 223(b)(2).[14] At no time during the Commission's investigation were any of the Commission-approved blocking methods or any other restrictive measures used by Fourth Media in connection with the recorded messages.

8. Based on the foregoing, it appears that Fourth Media has willfully and repeatedly violated Section 223(b) of the Act and that imposition of forfeiture penalties is war-

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subsequent calls from any identified number to its sales operators. The apparent purpose of this operation is to limit callers to a single five-minute sample of Fourth Media's messages.

[6] Under Miller v. California, 413 U.S. 15 (1973), a work is obscene if

(a) an average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24.

[7] The Supreme Court has defined prurient as "that which appeals to a shameful or morbid interest in sex." Brocket v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985); Roth v. United States, 354 U.S. 476, 487 n.20 (1957). We find that the messages, which consist entirely of detailed, repeated, explicit descriptions and simulations of a wide range of sexual activities, satisfy this definition. Indeed, the very purpose of these dial-a-porn messages is apparently to appeal to the prurient interest.

[8] In *Miller*, the Supreme Court gave examples of what a statute could define as "patently offensive" depictions or descriptions of sexual conduct:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Miller v. California, 413 U.S. at 25.

[9] *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1977). *See also*, Action for Children's Television v. FCC, 852 F.2d 1332, 1334 (D.C. Cir. 1988) (upholding FCC's generic definition of indecency); Evergreen Media Corp. of Chicago AM, 6 FCC Rcd 502 (1991); Guy Gannett Publishing Co., 5 FCC Rcd 7688 (1990); Pacifica Foundation, Inc., 2 FCC Rcd 2698 (1987); Infinity Broadcasting Corp., 2 FCC Rcd 2705 (1987); Regents of the University of California, 2 FCC Rcd 2703 (1987); *order on reconsideration*, Infinity Broadcasting Corp., 3 FCC Rcd 930 (1987).

[10] *See Pacifica*, 438 U.S. at 732; Pacifica Foundation, 56 FCC 2d 94, 98 (1975).*See also* Information Providers Coalition for the Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991); Dial Information Services v. Thornburgh, 938 F.2d 1535, 1540-41 (2d Cir. 1991).

[11] *See Pacifica*, 438 U.S. at 732.

[12] 135 Cong. Rec. S15, 793, 15,800-01 (daily ed. Nov. 16, 1989) (statement of Sen. Helms); *id.* at S15, 795 (statement of Sen. Coats).

[13] Infinity Broadcasting of Pennsylvania, *et al.*, 3 FCC Rcd 930, 931-32 (1987).

[14] *See* 47 C.F.R. § 64.201. The techniques include: (1) requiring payment by credit card, (2) use of an access or identification code prior to transmission, (3) message scrambling. The message provider must also have notified the carrier, in writing, of its provision of indecent messages. 47 C.F.R. § 64.201. We note that the Supreme Court has acknowledged the feasibility of each of these blocking techniques. *See Sable*, 109 S. Ct. at 2838-39.

ranted. Under Section 223(b)(5) of the Act, the Commission has the authority to levy a civil fine[15] not exceeding $50,000 for each violation. The statute further states that each day of violation shall be treated as a separate violation.[16] In the instant case, our investigation shows that Fourth Media apparently violated Section 223(b) of the Act by transmitting obscene and indecent communications on at least seven days. Thus, for the purposes of this forfeiture proceeding, we find seven separate violations by Fourth Media, each warranting a penalty under Section 223(b)(5).

9. The Commission has adopted standards for assessing forfeitures in particular cases.[17] Pursuant to the *Policy Statement*, we treat the Section 223(b) statutory maximum of $50,000 per violation "as if it were a prescribed base amount, subject to downward adjustments."[18] However, none of the downward adjustment factors applies to the facts before us in this case.[19] Thus, after due consideration, we find that a forfeiture of $50,000 for each of the seven violations, a total of $350,000, is appropriate.

III. CONCLUSION

10. We have carefully evaluated the information obtained as a result of our investigation, and have determined that there have been at least seven apparent violations of Section 223(b) of the Act by Fourth Media. From the facts adduced, we can reasonably conclude that, during the period monitored, Fourth Media 's tape recorded adult messages, specified in the Appendix, were provided over the telephone network without any restrictions that would prevent access by children or nonconsenting adults. Furthermore, because we find the recorded messages provided by Fourth Media over its 800-service lines and recorded by FOB to be consistently obscene and indecent, we can reasonably conclude that other Fourth Media messages available to minors during the period of investigation were obscene and indecent as well.

11. Accordingly, we find that Fourth Media willfully and repeatedly violated Section 223(b)(1) of the Act by making obscene communications by telephone for commercial purposes from at least September 18, 1991, through October 9, 1991. We further conclude that Fourth Media violated Section 223(b)(2) by failing to restrict access by minors to indecent communications transmitted by telephone by Fourth Media for commercial purposes during the same time period.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 154(j), and 223(b), that Fourth Media is apparently liable for forfeiture in the amount of $350,000 for its willful and repeated violations of Section 223(b) of the Act, 47 U.S.C. § 223(b), in the manner and on the dates described above.

13. IT IS FURTHER ORDERED that Fourth Media shall within thirty days of the release date of this notice pay the full amount of the proposed forfeiture or file a response showing why the proposed forfeiture should not be imposed or the reason why the proposed forfeiture should be reduced.[20] If the forfeiture is not paid, the response should include supporting evidence sufficient to rebut the tentative conclusions outlined in this notice.

14. IT IS FURTHER ORDERED that a copy of this Notice shall be sent by certified mail, return receipt requested, to Fourth Media, Suite 300, 1000 Circle Parkway, Atlanta, Georgia 30339.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

APPENDIX

First (800) Telephone Number

Date	Time
9/24/91	4:05 p.m.
9/25/91	4:08 p.m.
9/26/91	4:12 p.m.
10/1/91	3:55 p.m.
10/3/91	4:12 p.m.
10/9/91	4:12 p.m.

Second (800) Telephone Number

Date	Time
9/18/91	6:05 p.m.
9/19/91	3:57 p.m.

[15] The statute's use of the term "civil fine" is interchangeable with the Commission's historical use of the term "forfeiture" and for the purposes of enforcing Section 223(b), we will continue to use the term forfeiture.

[16] Section 223(b)(5) states:

(A) [W]hoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed... by the Commission after appropriate administrative proceedings.

47 U.S.C. § 223(b)(5).

[17] Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991) (*Policy Statement*).

[18] *Id.* at app. n.7. Several of the upward adjustment criteria listed in the *Policy Statement* would be appropriate to apply to this forfeiture. However, $50,000 per violation is the statutory maximum. *Id.* at 4700.

[19] The downward adjustment criteria are: (1) minor violation, (2) good faith or voluntary disclosure, (3) history of overall compliance, and (4) inability to pay. *Id.*

[20] The forfeiture amount should be paid by check or mail order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

9/24/91	4:12 p.m.
9/30/91	4:02 p.m.
10/1/91	4:05 p.m.

Third (800) Telephone Number

Date	Time
9/18/91	6:15 p.m.
9/19/91	4:10 p.m.
9/24/91	4:20 p.m.
9/25/91	4:28 p.m.
9/30/91	4:12 p.m.
10/1/91	4:13 p.m.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

FM Information, Inc. File No. 4440-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on E-group channels
at Rochester, New York

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1992; Released: August 17, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Rochester, New York initially was filed by FM Information, Inc. (FM). Subsequently, FM filed an amendment to change the ownership for this application from FM to Physicians Radio Network, Inc. (Network).[1] At that time, it was disclosed that a director of Network is a Canadian citizen.[2]

2. *Discussion.* Pursuant to 47 C.F.R. Sec. 21.23(b),[3] FM must be granted permission to make this ownership change. In determining whether to grant the amendment, Section 21.23(b) provides that consideration may be given to whether the new applicant is in a prohibited class of applicants and licensees as defined by 47 C.F.R. Sec. 21.4. An alien director for any MMDS station is prohibited by Section 21.4. We find that FM failed to demonstrate good cause in this instance for us to grant an ownership change to a corporate applicant that is ineligible to be an MMDS station licensee under Section 21.4 of the rules.[4]

3. *Conclusion.* Therefore, we deny permission for this amendment as contrary to the public interest. IT IS ORDERED that FM's change of ownership amendment IS HEREBY DENIED. Accordingly, FM Information, Inc. remains the MMDS applicant.[5] We will proceed with further qualification review of the above-referenced MMDS application of FM Information, Inc. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[1] FM explains the change as follows: "This change results from a merger of FM... to [Network], whereby [Network] acquired the assets of FM ..., and [Network] itself was acquired directly by the shareholders of FM ..., the Golder Thoma Fund. ([Network] previously was a subsidiary of FM ...)." Amendment at 7.

[2] This same individual controls 12% of Network's stock.

[3] Section 21.23(b) provides *inter alia:* "The Commission ... may grant requests to amend an application ... tentatively selected by the random selection process, only if a written petition demonstrating good cause is submitted and properly served upon the parties of record ...." FM's application was tentatively selected for qualification review by lottery.

[4] *See Continental Cellular*, 6 FCC Rcd 6834 (1991) ("An application that does not comply with the alien ownership provisions of the Act and our rules, 47 U.S.C. Section 310(b)(3); 47 C.F.R. Section 22.4(b)(3), is thus unacceptable for filing and properly dismissed." *Id.* at 6835.); *see also Wilner & Scheiner*, 103 FCC 2d 511 (1985) (affirming dismissal of alien partnership application); *PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988) (affirming dismissal of applications filed by an alien corporate applicant "[b]ecause compliance with the citizenship requirements of Section 310 is necessary for an application to be acceptable for filing." *Id.*).

[5] Due to our disposition of the Physician's Radio Network amendment, we hereby dismiss as moot the subsequent ownership change amendment. *See Continental Cellular*, 6 FCC Rcd 6834 (1991) ("Upon discovering that GTRW's application contained an alien general partner, the [Mobile Services Division] should have returned the application and denied any subsequent corrective amendment." *Id.* at 6836.)

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 31, 1992

Released: August 6, 1992

Senator John F. Kelly
15206 Mack Ave.
Detroit, MI 48224

Dear Senator Kelly:

This is in response to your recent complaint against station WXYZ-TV, Detroit, Michigan, alleging that the station denied your request for equal opportunities pursuant to Section 315(a) of the Communications Act of 1934, as amended. 47 U.S.C. Section 315(a).

You state that your opponent, Congressman John Conyers, is a legally qualified candidate for the office of United States Representative in Michigan's 14th Congressional District, an office that he currently holds. You complain that Mr. Conyers appeared in a series of promotional advertisements for a special news documentary aired on the twenty-fifth anniversary of the 1967 Detroit riots. While Mr. Conyers also allegedly appeared in the news documentary itself, you recognize that the documentary is exempt from equal opportunities under Section 315(a) of the Communications Act. You claim that 30-second promotional advertisements for the documentary aired no less than 61 times between July 10 and July 24, 1992, including during prime time and the news, with Mr. Conyers' picture on the screen for no less than 20 of the 30 seconds. You state your belief that WXYZ did not use good faith news judgment in the timing and placement of these promotional advertisements two weeks before the primary. You contend that WXYZ reporter Jim Harrington told you in a telephone interview on July 22 that "Mr. Conyers expressly *approved* the use of his image in their report on his involvement in the purported news documentary." In a subsequent telephone conversation with this office, you indicated that this express approval by Mr. Conyers extended to his appearance in the promotions for the news documentary.

On July 16, 1992, you contacted the station and asked that they voluntarily reconfigure their promotional spots in order to minimize the "gratuitous advertisement being accorded Mr. Conyers." The station apparently did not respond to your request. In a letter dated July 22, you requested equal opportunities from WXYZ-TV in connection with the promotional advertisements. In correspondence dated July 24, 1992, Scripps Howard Broadcasting Co., licensee of station WXYZ-TV, replied through counsel that no "use" was involved because the program promotions in question promoted a news documentary, and because Representative Conyers did not approve the use of his name or image in the program promotion; nor did the station consult him about the promotion at any time. Based on this information, the station denied your request for equal opportunities.

In light of the fact that there was a discrepancy as to whether Mr. Conyers approved of his appearance in the promotional spot, we contacted you to request further proof of your allegation. You have been unable to provide us with such further proof.

DISCUSSION

Section 315(a) of the Communications Act provides, in pertinent part, that if a licensee permits a legally qualified candidate for any public office to "use" its facilities, it shall afford equal opportunities to all other candidates for that office. In its recent *Report and Order, Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 685 (1991), the Commission narrowed its definition of "use" under Section 315(a) to include "only non-exempt candidate appearances that are controlled, approved, or sponsored by the candidate... after the candidate becomes legally qualified." Thus, if a legally qualified candidate does not voluntarily appear in a non-exempt broadcast, his appearance would not constitute a use. *See id.; Mr. Thomas J. Kelly*, 7 FCC Rcd 1960 (MMB, 1992).

While you allege that Mr. Conyers expressly approved his appearance in the promotional advertisements for the news documentary, the station maintains that Representative Conyers did not approve the use of his name or image in the program promotion. Without additional evidence from you, there is insufficient information to conclude, for purposes of determining whether a *prima facie* case has been established, that Mr. Conyers approved his appearance in the station's promotion. Therefore, Mr. Conyers' appearances in the promotional announcements do not meet the definition of a "use" under Section 315(a), and station WXYZ is not required to provide you with equal opportunities.

In light of the foregoing, your complaint is DENIED.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (*see* Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Spacenet Corporation File No. 962-DSEP/L-83
Streamlined Licensing Procedures
for 4/6 GHz Earth Stations

ORDER AND AUTHORIZATION

Adopted: August 6, 1992; Released: August 17, 1992

By the Chief, Common Carrier Bureau:

1. GTE Spacenet Corporation (GTE), on behalf of GTE Spacenet Satellite Services Corporation,[1] has filed an application to streamline further the licensing procedures for their small satellite earth stations operating in the 4/6 GHz band.[2] GTE proposes certain changes in the manner in which their small aperture, low power transmit/receive earth stations are licensed. For the reasons discussed below, GTE's application is granted with certain conditions.

2. GTE requests that streamlined procedures be applied to its small transmit/receive earth stations that have previously been subject to simplified processing.[3] Under the simplified procedures now in effect, individual applications for each station are submitted to the Commission using an abbreviated form. Included on this form is site specific frequency coordination information and the antenna size. Other technical information is the same for each antenna, and is, therefore, not included with each individual application. GTE pays an application processing fee of $35 for each station application it files. These applications are processed on an individual basis by Commission staff. Each one is reviewed, given a file number and put on public notice. An individual license is produced for each earth station and a public notice is issued announcing its grant.

3. GTE proposes to modify this process as follows: The Commission would grant a "lead" or "blanket" application to construct and operate up to 30,000 small aperture 4/6 GHz earth stations. GTE would complete frequency coordination for each individual station before bringing it into service and the information would be kept in the coordinator's master data base and would be available to the Commission on request. On a monthly basis, GTE would file with the Commission a list of new earth stations brought into service. Included on this list would be the location of each station as well as a certification that frequency coordination has been completed and that the earth station complies with all environmental and FAA requirements. GTE's application, as amended, was put on public notice and no comments were received.

4. Implementing a streamlined procedure for these stations is in the public interest. First, because of the low power used by the earth stations covered by this application, it is unlikely that they will cause harmful interference to other facilities. Second, implementation of these procedures will reduce administrative burdens on both the applicant and the Commission and will ensure that service is provided to the public in a more timely fashion. A monthly report of new stations will be sufficient for Commission monitoring and for public notice.

5. However, certain modifications to GTE's proposal are necessary. First, because of international agreements regarding coordination of earth station facilities with Mexico and Canada, GTE must submit certain frequency coordination information with respect to each earth station brought into service under its blanket authorization.[4] The information required is listed in Appendix A of this order. In addition, in order to derive the maximum efficiencies from streamlined processing, GTE will be required to submit its application information in computer readable format. The details of such a system will be arranged with Commission staff and may be adjusted to reflect changing computer technology.[5]

6. The lead authorization granted to Equatorial in 1984 and now held by GTE will be converted to a blanket authorization covering up to 30,000 earth stations that meet the technical criteria for streamlined processing. All existing licenses for small aperture 4/6 GHz antennas as described[6] will be covered by this authorization under the same call sign. Any other application for earth station facilities filed by GTE must continue to conform to standard licensing procedures.[7]

7. Accordingly, the authority granted by *Equatorial Communications Company*, Mimeo No. 2831 (March 31, 1984) is modified pursuant to 47 USC § 316 and GTE is hereby granted blanket authority to operate up to 30,000 small aperture earth stations for operation in the 4/6 GHz bands and to use streamlined application filing procedures subject to the following conditions:

a) GTE shall file an updated technical description of its system within 30 days of the release of this order including the following information: a list of existing antenna facilities, transmitting equipment and frequencies in actual use at the corresponding stations, specifying for each carrier the radio frequency (r.f.) center frequency, polarization, emission designator, EIRP (dBW) and EIRP density (dBW/4 kHz).

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[1] This application was originally filed by Equatorial Communications Company (Equatorial) which became a wholly owned subsidiary of GTE Spacenet Services Corporation when GTE merged with Contel. *See* Contel Corporation, 6 FCC Rcd 1003 (1991).

[2] These stations are 1.2 or 1.4 meters in size.

[3] *See* Equatorial Communications Services, Mimeo No. 2831 (March 31, 1984). GTE has continued to apply for authorization of small aperture 4/6 GHz antennas pursuant to this 1984 order and thus the newly codified earth station processing rules (*see* Amendment of Part 25, 6 FCC Rcd 2806 (1991)) are generally not applicable to these applications. To any extent necessary, earth station application rules contained in 47 CFR Part 25 are waived by this order.

[4] Construction and operation of antennas covered by this blanket authorization must not violate any international agreements.

[5] GTE must, of course, submit a processing fee of $35 for every earth station listed in its monthly filing together with a Form 155 reflecting the total number of stations included.

[6] *See* note 2, supra.

[7] *See* 47 CFR Part 25.

b) Earth stations covered by this blanket authority shall include all previously licensed stations that meet the technical criteria for streamlined processing, stations of the same variety for which applications are pending, and all new stations implemented pursuant to this streamlined procedure. The license term for all of these stations shall extend for 10 years from the release date of this order.

c) GTE shall provide the Commission, on a monthly basis, the information listed in Appendix A for each new earth station brought into service. This information shall be provided in a computer readable format and in a hard copy.

d) GTE shall certify that each station brought into service complies with all environmental and FAA requirements.[8]

e) GTE, on an annual basis each October 1, shall provide the Commission with an updated list of all operational earth stations.

f) GTE shall maintain on file with the Commission a central point of contact, including a telephone number for coordination purposes, and must inform the Commission of any changes in this information.

8. GTE has 30 days from the date of release of this order and authorization to decline this authorization as conditioned. Failure to respond within that time period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

APPENDIX A

1. call sign
2. site identification number
3. location/ city and state
4. latitude and longitude, elevation of the ground above mean sea level and overall height of the antenna structure above ground level
5. number of antennas at each site
6. ground altitude in meters above sea level
7. maximum antenna height in meters above ground level
8. antenna make and model number
9. rated output power of transmitter(s)
10. transmit frequency in MHz for each carrier
11. emission designator for each carrier

[8] Construction of any antenna facilities must comply with all environmental and antenna marking rules, *see* 47 CFR Part 1, Subpart I and Part 17.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-92-087

For Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish via the Tanguisson Point (Harmon) Earth Station Circuits for Restoring Digital Fiber Optic Cables and Providing AT&T's Authorized Services between Points in or Reached Via both the United States and Various Pacific Ocean Region Locations.

Application for Authority to Construct and Operate an International Multipurpose Earth Station located at Tanguisson Point, Guam (Call Sign KA-329) — File No. CSG-91-047-P/L

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 31, 1992; Released: August 12, 1992

By the Chief, International Facilities Division:

I. INTRODUCTION

1. The captioned applications filed by American Telephone & Telegraph Company, (AT&T), request authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate an international earth station facility at Tanguisson Point, Guam, and to use these facilities to establish and operate channels of communication between the proposed Tanguisson Point earth station and INTELSAT Pacific Ocean Region (POR) satellites to provide restoration capacity for POR digital cables and to provide AT&T's authorized telecommunications services between the U.S. mainland and Guam. AT&T also seeks authorization to operate up to 11,580 additional Intermediate Data Rate (IDR) circuits to the proposed earth station for the provision of these services.[1] The Title III application was placed on public notice on February 27, 1991 and was amended to make minor technical changes and clarify certain aspects of the application. MCI International Inc. (MCII) filed on March 29, 1991, a petition to condition the authorization or deny AT&T's application. AT&T filed a Reply to MCII's petition to condition or deny the application on April 11, 1991, and MCII replied to AT&T's response on April 23, 1991. IT&E Overseas, Inc. (IT&E) motioned to strike MCI's Reply on May 16, 1991 and MCI filed an opposition to IT&E's motion on May 21, 1991. The Section 214 application was placed on public notice on February 5, 1992. No comments were filed.

II. THE APPLICATIONS

2. AT&T proposes to construct[2] and operate[3] an 18.3-meter C-band earth station located at Tanguisson Point, Guam, which shall meet INTELSAT Revised Standard A technical parameters, to be utilized in conjunction with the INTELSAT Global Communications Satellite System to provide IDR service obtained from Comsat on a preemptible basis between the U.S. and Guam only. In addition, AT&T requests authority to establish and operate channels of communication between the proposed Tanguisson Point earth station and INTELSAT POR satellites to provide restoration capacity for POR digital cables between Guam and Japan, Taiwan, Australia, and the Philippines, and also to provide AT&T's authorized telecommunications services between the U.S. mainland and Guam. AT&T asserts that it may interconnect the satellite link between the U.S. mainland and Tanguisson Point earth station with cable facilities landing in Guam for the provision of AT&T's authorized services beyond Guam. However, AT&T's authorized services will not be provided between Guam and any foreign point via satellite except for restoration purposes.

3. The proposed earth station facility will employ Quadrature Phase Shift Keying (QPSK) to transmit and receive digital signals. When providing restoration, the earth station will provide digital communications to those same points in the POR that the cable with the outage served. The earth station design will permit operation with any INTELSAT satellite serving the POR in the satellite arc between 170^0 and 200^0 West Longitude and will transmit in the 5925-6425 MHz frequency band and receive in the 3700-4200 MHz frequency band.

4. AT&T is a common carrier authorized to provide telecommunications services to the POR and IOR countries. The circuits covered by this application will extend to the POR countries only. AT&T states that pursuant to existing satellite authorizations, it will acquire from Comsat uplinks between an appropriate U.S. earth station and the appropriate POR satellite. AT&T proposes to acquire from Comsat, at tariff rates, the downlinks between the appropriate POR satellite and the proposed Tanguisson Point earth station.

5. AT&T states that the current satellite and earth station facilities are inadequate for restoring services carried over the existing cables in the POR. The proposed earth station will permit AT&T to utilize newer earth station and terrestrial facility technologies to restore digital fiber optic cables in the POR on a more cost effective basis. AT&T further states that it needs the Tanguisson Point earth station because current satellite and earth station facilities are inadequate for restoring services carried over existing common carrier fiber optic digital cables in the POR.

III. DISCUSSION

6. MCII alleges that AT&T's proposed earth station would be capable of IDR services and suggests that the issue of access to earth stations by non-owners is so pervasive that a rulemaking would better serve the public interest. MCII also contends that if the Commission grants the

instant application, it should be conditioned on AT&T providing equitable access to other carriers on a non-discriminatory basis.

7. In its June 16, 1992, letter clarifying its application, AT&T states that it intends to use the earth station for non-restoration purposes on a preemptible basis between the U.S. mainland and Guam only. AT&T further states that it will not use the earth station to provide services to foreign points beyond Guam via satellite except for restoration purposes. AT&T contends that the proposed earth station will be used primarily to restore the POR digital cable systems and secondarily to interconnect with AT&T's cable facilities in Guam for the provision of its authorized services beyond Guam. However, the earth station will not be used to provide AT&T's authorized services beyond Guam via satellite, except for restoration purposes, and only to the following for which AT&T has been authorized to provide its services via submarine cable facilities: Japan, Taiwan, Australia and the Philippines. Thus, AT&T's application is limited in scope.

8. Under normal circumstances, the issue of equitable access by other carriers is not presented in the context of an application to construct and operate an earth station. However, in light of the limited number of carriers and facilities in Guam, access to facilities of other carriers may be a critical concern. Therefore, this authorization is conditioned upon the requirement that AT&T provide access to its authorized services provided between the mainland and Guam on a tariffed, non-discriminatory basis to all authorized users under just and reasonable charges. This condition will apply even though the service may be preempted if cable restoration becomes necessary.[4]

9. The Commission believes that MCII's concerns regarding any services which AT&T may provide between Guam and foreign points are not at issue in this application. In its June 16, 1992 letter, AT&T has clarified that it intends to use the earth station solely for restoration purposes beyond Guam. Should AT&T apply for separate Section 214 authority to use its earth station to supply its authorized services via satellite beyond Guam, MCII may address its concerns at that time.

IV. CONCLUSION/ORDERING CLAUSES

10. In conclusion, we find that the grant of AT&T's application to construct and operate an 18.3-meter C-band international multipurpose earth station located at Tanguisson Point, Guam, and to provide its authorized telecommunications service between the U.S. mainland and Guam on a preemptible basis as a common carrier and to provide restoration of POR digital submarine cables between Guam and Japan, Taiwan, Australia, and the Philippines, the foreign points to which service is provided by the POR submarine cable system, will serve the public interest, convenience and necessity.

11. Accordingly, IT IS ORDERED, pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, and § 201(c)(7) of the Communications Satellite Act of 1962, as amended, that applications File Nos. CSG-91-047-P/L and I-T-C-92-087 ARE GRANTED and AT&T is authorized to construct and operate an 18.3-meter C-band international multipurpose earth station located at Tanguisson Point, Guam, (Call Sign KA-329).

12. IT IS FURTHER ORDERED that AT&T is authorized to acquire from Comsat and operate 11,580 additional IDR circuits over INTELSAT POR satellites via the Tanguisson Point earth station to provide its authorized telecommunications services on a preemptible basis, between the U.S. mainland and Guam, and for restoration purposes beyond Guam to Japan, Taiwan, Australia and the Philippines, those POR points served by the restored cable.

13. IT IS FURTHER ORDERED that AT&T shall provide access to its authorized services provided between the U.S. mainland and Guam on a tariffed, non-discriminatory, and premptible basis to all authorized users under just and reasonable charges.

14. IT IS FURTHER ORDERED that AT&T shall file for additional Section 214 authority and modification of its earth station license if it intends to extend the provision of its authorized services between Guam and foreign points via the Tanguisson Point satellite.

15. IT IS FURTHER ORDERED that AT&T shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61.

16. IT IS FURTHER ORDERED that the applicant shall submit monthly reports detailing the number and capacity of circuits in use over the POR satellites.

17. IT IS FURTHER ORDERED that AT&T shall file the required certifications listed in Section 25.133 of the Commissions Rules, 47 C.F.R. §25.133.

18. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

19. IT IS FURTHER ORDERED that MCII's petition to condition or deny the application is DENIED to the extent stated above.

20. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] AT&T originally requested that the Commission grant authority to establish and restore cables between the U.S. and the POR and IOR. AT&T subsequently modified its request to include only the POR.

[2] Subsequent to the filing of AT&T's application, the Commission amended Section 25.113 to eliminate the requirement of a construction permit to construct a station of this type, effective June 27, 1991. *Amendment of Part 25 of the Commission's Interference Revise Services*, 6 FCC Rcd 2806, 2809 and 2817 (1991).

[3] On January 28, 1992, AT&T requested Special Temporary Authority to operate the earth station and establish circuits for testing and restoring the fiber optic cables in the POR and IOR.

AT&T modified this request to include only the POR on February 6, 1992. AT&T's request was granted February 27, 1992 (TAO-2002 and TAO-2003).

[4] *See* MCI International Inc., File No. CSG 91-035-P/L, 7 FCC Rcd 2215 (1992). Under similar circumstances, the Commission addressed the issue of equitable access and required the applicant to offer its services on a tariffed, non-discriminatory basis. *Id.* at ¶11-13.

[5] Because all subsequent comments to this application are based on MCII's petition, we also find that these concerns are not at issue at this time.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-109

In the Matter of

Amendment of Section 73.202(b), RM-7966
Table of Allotments,
FM Broadcast Stations.
(Carmel Valley, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 22, 1992; Released: August 18, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 3054 (1992), issued in response to a petition for rule making filed on behalf of Joseph and Jan Miller proposing an allotment of Channel 290A to Carmel Valley, California.[1] No comments or expressions of interest were filed in response to the *Notice*.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making allotments to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Joseph and Jan Miller, proposing an allotment of Channel 290A to Carmel Valley, California IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in footnote 1 of the *Notice*, the original proposal, filed by Eric Hilding on behalf of the Millers, included proposals to allot channels to Carmel Valley, Hollister and Scotts Valley, California and to substitute channels at Hollister and Carmel. That petition was returned by staff letter as procedurally defective. Hilding filed a petition for reconsideration which was granted insofar as it reinstated the Carmel Valley proposal dismissed herein. *See Memorandum Opinion and Order*, DA 92-556, released May 15, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-477

In the Matter of

Amendment of Section 73.202(b),	RM-7349
Table of Allotments,	RM-7605
FM Broadcast Stations.	RM-7630
(Fisher, Mattoon, Neoga,	
Teutopolis, and Tuscola, Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 23, 1992; Released: August 18, 1992

By the Chief, Allocations Branch:

1. At the request of The Cromwell Group, Inc. of Illinois ("Cromwell"), licensee of Station WMCI, Mattoon, Illinois, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6341 (1990), proposing the substitution of Channel 267B1 for Channel 267A at Mattoon, the reallotment of Channel 267B1 from Mattoon to Neoga, Illinois, and the modification of Station WMCI's license to specify Neoga as the community of license. Cromwell filed comments restating its intention to apply for Channel 267B1 at Neoga, if allotted. Counterproposals were filed by Globe Communications Company ("Globe") (RM-7630) and TNT Communications ("TNT") (RM-7605).[2] Cromwell filed reply comments, an erratum and supplemental reply comments accompanied by a motion to accept. In response to Globe's counterproposal Illini Broadcasting, Inc. ("Illini"), licensee of WITT(FM), Tuscola, Illinois, Larry A. Trimmer ("Trimmer"), Cromwell and Sangamon filed comments.

2. Cromwell restated its interest in the substitution of Channel 267B1 for Channel 267A at Mattoon, and the reallotment of Channel 267B1 from Mattoon to Neoga, Illinois. Cromwell notes that Neoga is neither adjacent, nor in close proximity, to any urban area. Cromwell states that the reallotment will enable Neoga to have its first local transmission service and enable WMCI(FM) to upgrade its facility. Mattoon will not be deprived of local broadcast service, notes Cromwell, since it will continue to receive transmission service from Station WLBH(AM) and WLBH(FM), Mattoon.

3. In its counterproposal, Globe requests the allotment of Channel 267B1 to Teutopolis, Illinois, as that community's first local service; the allotment of Channel 228A to Fisher, Illinois, as that community's first local service; the substitution of Channel 229A for Channel 267A at Mattoon; and the substitution of Channel 266A for Channel 228A at Tuscola, Illinois. The allotment of Channel 267B1 at Teutopolis is mutually exclusive with the allotment of Channel 267B1 at Neoga. Globe states that this counterproposal provides two communities with first local FM transmission services. Globe states that Fisher (population 1,515 persons)[3] is an incorporated community located in Champaign County (population 168,900 persons). Globe claims that the allotment of Channel 288A to Fisher would provide an additional reception service to 166,522 persons in the area. Globe also notes that Teutopolis (population 1,249 persons) is an incorporated community, located in Effingham County (population 33,500 persons). Globe states that Channel 266A can be substituted for Channel 228A at Tuscola, Illinois, at Station WITT(FM)'s present transmitter site, and Channel 229A can be substituted for Channel 267A at Mattoon, Illinois, at Station WMCI(FM)'s present transmitter site. Globe indicates that it will reimburse the licensees at Mattoon and Tuscola for reasonable and prudent expenses incurred in accomplishing the required channel changes.

4. Cromwell argues that Globe's proposal should not be considered a counterproposal, since an alternate Class A channel can be allotted to Fisher, thereby removing the conflict between the Globe and the Cromwell proposals. Cromwell submits that Channel 273A may be allotted to Fisher at a reference point approximately five kilometers northwest of the community, without any changes to existing stations. Therefore, Cromwell argues that the proposal to allot Channel 228A to Fisher should be accepted only as a separate petition for rule making and made the subject of a separate *Notice of Proposed Rule Making*.[4]

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[1] The communities of Fisher, Teutopolis, and Tuscola, Illinois, have been added to the caption.

[2] Public Notice of the counterproposals was given on February 15, 1991, Report No. 1838.

TNT's counterproposal was erroneously placed on public notice. TNT's counterproposal was filed December 28, 1990, after the comment period for this proceeding expired on December 21, 1990. Therefore, the counterproposal is untimely filed and is not acceptable for consideration in this proceeding. *See* Section 1.415 of the Commission's Rules. In addition, TNT failed to give an address and include an affidavit verifying that the statements contained in its petition are accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed.

[3] Population figures are taken from the 1980 U.S. Census.

[4] Cromwell further contends that Globe is not a legally cognizable entity or real person. Cromwell states that Illinois state records show no evidence of an entity named either Globe Communications or Globe Broadcasting Company currently existing as an Illinois corporation. Noting that Section 1.401(a) of the Commission's Rules specifies that "any interested person may file a petition..." Globe maintains that the Commission's threshold rule for filing a petition for rule making is not satisfied. Therefore, Cromwell argues that the comments and counterproposal of Globe are unacceptable and should be dismissed. We decline to do so. We do not believe that a petitioner's or counterproponent's failure to comply with a state's corporation registration requirements warrants dismissal of a proposal.

5. Cromwell argues that while Teutopolis is currently without a local broadcast service, Globe has not provided any information to demonstrate that Teutopolis is in greater need of first local transmission service than Neoga. Cromwell contends that Globe has not addressed whether Teutopolis is self governing, and whether it provides its residents with municipal services such as police and fire protection, water and sewer service, schools and employment. Cromwell argues that because Teutopolis is located approximately four miles from Effingham, a community of 11,851 persons, the Commission needs to consider whether the *Huntington* doctrine, as stated in *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33, (D.C. Cir. 1951), should apply to the Teutopolis proposal. Finally, Cromwell argues that Globe's proposal is merely a blocking proposal as Globe could derive an economic competitive benefit by blocking the WMCI(FM) proposal.

6. Illini filed opposing comments in response to Globe's counterproposal. Illini states that it is "unclear" why Globe's proposal needs to be submitted as a counterproposal in this proceeding, when Channel 273A can be allotted to Fisher without affecting either the Cromwell proposal or Illini's license for WITT(FM) on Channel 228A in Tuscola, Illinois. Illini also states that Neoga has a larger population than Teutopolis (1,736 vs. 1,417 persons, according to the 1990 Census), and thus, Neoga has a greater need for first local service than Teutopolis. Illini further states that Teutopolis is within several miles of Effingham, Illinois, which has three licensed aural transmission services. Therefore, Globe's proposal would not provide first local service to Teutopolis. Illini also notes that Globe states its intention to apply for the new allotments in both Teutopolis and Fisher, two communities located less than 90 miles from each other. It maintains that Globe would be unlikely to obtain both licenses in comparative hearings, because Globe can only propose integration of ownership and management at only one station at a time. Illini notes that Globe would be attributed with a media interest as soon as it obtains a construction permit for one of these two stations.

7. In response to the counterproposals, Trimmer submits that a Class A channel should be allotted to Teutopolis rather than the requested Class B1 channel. Trimmer states that either Channel 255A or Channel 272A can be allotted to Teutopolis. Trimmer states his intention to apply for a Class A channel if allotted to Teutopolis. Trimmer contends that this expression of interest is not a late-filed counterproposal, but is instead comments in support of a preferential allotment of channels to communities that have already been proposed in this proceeding. Trimmer contends that the allotment of a Class A channel to Teutopolis will allow the Commission to provide Teutopolis with first local service while still granting each of the other proposals in this proceeding. In his reply comments, Sangamon supports the allotment of Class A Channels 255A or 272A at Teutopolis, and states its intention to file an application, if either Channel 255A or 272A is allotted.

8. Cromwell in reply comments supports Trimmer's proposal to allot Channel 255A or 272A to Teutopolis, and Channel 273A to Fisher. However, if the communities were comparatively considered, Cromwell argues that the larger community of Neoga would be preferred over Teutopolis. In addition, the Neoga proposal will provide service to both Neoga and Teutopolis, while the proposal for Teutopolis will not provide service to Neoga.

9. Based on the information before us, we believe that the public interest would be served by providing Neoga, Fisher and Teutopolis with first local transmission services. No party has submitted information to rebut the presumption that the incorporated communities of Fisher and Teutopolis are not deserving of a first local service preference. A Commission engineering analysis indicates that there are no alternate Class B1 channels available for allotment to either Neoga or Teutopolis. However, a comparative analysis of the two requests is not necessary because a valid expression of interest in use of a Class A channel at Teutopolis has been filed.[5] Although Globe has expressed an intention to apply for the Class B1 channel at Teutopolis, it has not made any showing that a Class B1 channel would provide a first or second fulltime aural service or that a Class A channel is insufficient to provide the requisite signal coverage to the community. *See Durango and Telluride, Colorado and Kirtland, New Mexico*, 5 FCC Rcd 7467 (1990) and *Cottage Grove and Bend, Oregon*, 6 FCC Rcd 4208 (1991). In addition, Channel 273A can be allotted to Fisher, Illinois, thus allowing Station WMCI(FM) to upgrade and change its community of license from Mattoon to Neoga. This resolution will not require the licensee of Station WITT(FM), Channel 229A, Tuscola, to change channels.

10. We believe the public interest requires prompt initiation of new service, a goal which we believe can best be accomplished in this docket by allotting Channel 267B1 to Neoga, Illinois, Channel 272A to Teutopolis, Illinois and Channel 273A to Fisher, Illinois. Therefore, we will substitute Channel 267B1 for Channel 267A and reallot Channel 267B1 from Mattoon to Neoga, Illinois, and modify Station WMCI(FM)'s license to specify Channel 267B1 at Neoga. Cromwell has shown that the reallotment of Channel 267B1 from Mattoon to Neoga will result in a preferential arrangement of allotments. Neoga (population 1,736)[6] would receive its first local aural transmission service. Mattoon (population 19,055) will continue to receive local transmission service from Station WLBH(FM) and WLBH(AM). Furthermore, Station WMCI(FM) will be able to operate at increased power. In addition, the allotment of Channel 273A to Fisher and Channel 272A to Teutopolis will provide each community with first local transmission service.

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[5] We realize that the Commission has stated that it will not accept expressions of interest in an allotment proposed in a contested proceeding that are filed after the deadline for filing counterproposals. *See Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988), *aff'd*, 4 FCC Rcd 3412 (1989); *aff'd sub. nom. Amor Family Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990), and *Carolina Beach, North Carolina, et al.*, 7 FCC Rcd 544 (1992). However, when, as here, we have received a timely expression of interest in a higher class channel, and the later filed expression of interest in the lower class channel removes the conflict between proposals, we believe the public interest warrants acceptance.

[6] Population figures are taken from the 1990 U.S. Census.

11. Channel 267B1 can be allotted to Neoga, Illinois, in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 16 kilometers (9.9 miles) east of the city.[7] The site restriction is necessary in order to avoid a short-spacing to the licensed site of Station WMGI(FM), Channel 264B, Terre Haute, Indiana, and Station WBNQ(FM), Channel 268B, Bloomington, Indiana. Channel 273A can be allotted to Fisher, Illinois, in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 4.7 kilometers (2.9 miles) northwest of the community.[8] Channel 272A can be allotted to Teutopolis, Illinois, in compliance with the minimum distance separation requirements of the Commission's Rules, without a site restriction.[9]

12. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 1, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Fisher, Illinois	273A
Mattoon, Illinois	245B
Neoga, Illinois	267B1
Teutopolis, Illinois	272A

13. The window period for filing applications on Channel 273A at Fisher, Illinois, and Channel 272A at Teutopolis, Illinois, will open on **October 2, 1992,** and close on **November 2, 1992.**

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WMCI(FM), Mattoon, Illinois, IS MODIFIED, to specify operation on Channel 267B1 in lieu of Channel 267A at Neoga, Illinois, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1307 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the counterproposal filed by TNT Communications proposing the allotment of Channel 266A to Mt. Carmel, Illinois, IS DISMISSED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

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[7] The coordinates for Channel 267B1 at Neoga are North Latitude 39-17-19 and West Longitude 88-16-15.

[8] The coordinates for Channel 273A at Fisher are North Latitude 40-20-19 and West Longitude 88-23-56.

[9] The coordinates for Channel 272A at Teutopolis are North Latitude 39-07-54 and West Longitude 88-28-36.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-172

In the Matter of

Amendment of Section 73.202(b), RM-6965
Table of Allotments,
FM Broadcast Stations.
(Leland, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 24, 1992; Released: August 18, 1992

Comment Date: October 8, 1992
Reply Comment Date: October 23, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Interchange Communications, Inc. ("petitioner"), requesting the substititon of Channel 232C2 for Channel 232A at Leland, Mississippi. Petitioner also requests modification of its license for Station WBAD(FM), Channel 232A, to specify operation on Channel 232C2. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 232C2 can be allotted to Leland, Mississippi, consistent with the Commission's spacing requirements at petitioner's specified site.[1] Channel 232C2 at Leland is short-spaced to Channel 232A, Station KTRY-FM, Bastrop, Louisiana, and to Channel 232A, Station KTGY, Charleston, Mississippi. However, the license for Station KTRY-FM, Bastrop, was modified to specify operation on Channel 230C2 in Docket 84-231, 7 FCC Rcd 470 (1992), and the construction permit for Station KTGY, Charleston, was modified to specify operation on Channel 239A in Docket 88-14, 3 FCC Rcd 4315 (1988). The issuance of a license for Station WBAD(FM) on Channel 232C2 may be withheld until Station KTRY-FM is license on Channel 230C2 and Station KTGY is licensed on Channel 239A. We shall also propose to modify the license for Station WBAD(FM), Channel 232A, to specify operation on Channel 232C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the the substitution of Channel 232C2 for Channel 232A at Leland, Mississippi, since it would provide the community with its first wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Leland, Mississippi	232A, 272A	232C2, 272A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 8, 1992,** and reply comments on or before **October 23, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David Tillotson
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

6. IT IS FURTHER ORDERED, That the Secretary of the Commission, shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Jamie Patrick
Broadcasting, Ltd.
Bastrop,
Louisiana 71220

Charleston
Broadcasting Co., Inc.
Shelton Road
P.O. Box 9
Charleston, Mississippi 38921

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such

[1] The coordinates for Channel 232C2 at Leland are 33-24-55 and 90-59-18.

a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-174

In the Matter of

Amendment of Section 73.202(b), RM-8035
Table of Allotments,
FM Broadcast Stations.
(Grants, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 24, 1992; Released: August 18, 1992

Comment Date: October 8, 1992
Reply Comment Date: October 23, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Philip D. Vanderhoof ("petitioner") requesting the allotment of Channel 224C2 to Grants, New Mexico, as the community's fourth local FM service. Petitioner states that he will apply for the channel, if allotted.[2]

2. We believe the public interest would be served by proposing the allotment of Channel 224C2 to Grants since an interest has been expressed in providing the community with an additional local FM service. Channel 224C2 can be allotted to Grants in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3] We recognize that this allotment is short-spaced to the present operation on Station KMXQ, Channel 224A, Socorro, New Mexico. However, Station KMXQ's license was modified to specify operation on Channel 284C pursuant to the *Report and Order* in MM Docket 87-307.[4] A copy of this *Notice* will be sent to the licensee.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Grants, New Mexico	265C2, 279C, 288C	224C2, 264C2,[5] 279C, 288C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 8, 1992,** and reply comments on or before **October 23, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Philip D. Vanderhoof
P.O. Box 11102
Albuquerque, New Mexico 87192
(Petitioner)

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making,* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station KMXQ, as follows: H&HSB Corporation, 834 Highway 60 SW, Socorro, New Mexico 87801.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding.

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[2] Section 1.52 of the Commission's Rules requires that a petitioner sign and verify all petitions and pleadings unless represented by legal counsel. While the petitioner did sign the petition, he failed to include a verification statement. Petitioner is therefore requested to do so in comments herein. Failure to comply with Section 1.52 of the Rules may result in the dismissal of his request.

[3] The coordinates for Channel 224C2 at Grants are North Latitude 35-09-06 and West Longitude 107-51-36.

[4] *See* 3 FCC Rcd 2266 (1988).

[5] At the request of Don R. Davis, the Commission has proposed the substitution of Channel 264C2 for Channel 265C2 at Grants. *See Notice of Proposed Rule Making,* MM Docket 92-140, released June 30, 1992.

However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-175

In the Matter of

Amendment of Section 73.202(b), RM-8034
Table of Allotments,
FM Broadcast Stations.
(Pawley's Island and Atlantic Beach,
South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 24, 1992; Released: August 18, 1992

Comment Date: October 8, 1992
Reply Comment Date: October 23, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Audrey R. Morris ("petitioner") requesting the reallotment of Channel 262A from Pawley's Island to Atlantic Beach, South Carolina, as the community's first local FM service. She also requests the modification of Station WPAW's construction permit to specify Atlantic Beach as its community of license. Petitioner states that she will apply for the channel, if allotted.

2. Petitioner states that Atlantic Beach is an incorporated community located approximately 35 miles north of Pawley's Island. According to the petitioner, Atlantic Beach is one of the few historically black incorporated municipalities in the United States. She points out that the community has a mayor and town council, its own police department, town hall, community center and church. Further, reallotting Channel 262A from Pawley's Island to Atlantic Beach will enable Station WPAW to expand its coverage from an area of 962 square kilometers with a population of 53,309 persons to an area the same size but a population of 82,287 persons. Finally, she notes that the reallotment of Channel 262A from Pawley's Island will not result in the removal of the community's sole local broadcast service since Pawley's Island will retain local FM transmission service from Station WDAI, Channel 253A.

3. We believe the public interest would be served by proposing the reallotment of Channel 262A from Pawley's Island to Atlantic Beach, South Carolina, since it could provide the community with its first local aural transmission service and enable Station WPAW to increase the population which it serves. Channel 262A can be allotted to Atlantic Beach in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Atlantic Beach, South Carolina	--	262A
Pawley's Island, South Carolina	253A, 262A	253A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 8, 1992,** and reply comments on or before **October 23, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Neal J. Friedman, Esq.
Louise Cybulski, Esq.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall

[1] The coordinates for Channel 262A at Atlantic Beach are North Latitude 33-48-09 and West Longitude 78-43-00.

be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-173

In the Matter of

Amendment of Section 73.202(b), RM-8033
Table of Allotments,
FM Broadcast Stations.
(Lakewood, New York, and Clarendon,
Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 24, 1992; Released: August 18, 1992

Comment Date: October 8, 1992
Reply Comment Date: October 23, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robert Stevens ("petitioner") requesting the allotment of Channel 295B1 to Lakewood, New York, as the community's first local FM service. To accommodate the allotment at Lakewood, petitioner also requests the substitution of Channel 282A for unoccupied but applied-for Channel 295A at Clarendon, Pennsylvania.[1] Petitioner states that he will apply for the channel, if allotted to Lakewood.

2. We believe the public interest would be served by proposing the allotment of Channel 295B1 to Lakewood since it could provide the community with its first local aural transmission service. Channel 295B1 can be allotted to Lakewood with a site restriction of 10.1 kilometers (6.3 miles) south to avoid short-spacings to Station WCTL, Channel 292A, Union City, Pennsylvania, and Station CILQ-FM, Channel 296C1, Toronto, Ontario, Canada. Channel 282A can be allotted to Clarendon in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.1 kilometers (2.6 miles) west to avoid a short-spacing to Station WLMI, Channel 280A, Kane, Pennsylvania.[2] Canadian concurrence in the allotments at both Lakewood and Clarendon are required because both communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We note that the Simpsons are not entitled to reimbursement for the costs associated with changing channels because they are applicants and not permittees or licensees. However, if the proposal is adopted, they will be afforded an opportunity to amend their application to specify Channel 282A instead of Channel 295A at Clarendon, Pennsylvania, without loss of cut-off protection. In addition, they will be served with a copy of this *Notice of Proposed Rule Making*.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lakewood, New York	–	295B1
Clarendon, Pennsylvania	295A	282A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 8, 1992,** and reply comments on or before **October 23, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Frederick A. Polner, Esq.
Rothman Gordon Foreman & Groudine, P.C.
Third Floor, Grant Building
Pittsburgh, Pennsylvania 15219
(Counsel to petitioner)

7. IT IS ORDERED, That the Secretary of the Commission SHALL SEND, a copy of this *Notice of Proposed Rule Making* by REGISTERED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 295A at Clarendon, Pennsylvania, as follows: Cary H. and Betty F. Simpson, P.O. Box 247, Tyrone, Pennsylvania 16686.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed

[1] On March 6, 1992, Cary H. and Betty F. Simpson filed an application for Channel 295A at Clarendon (BPH-920306MA).

[2] The coordinates for Channel 295B1 at Lakewood are North Latitude 42-00-54 and West Longitude 79-17-38. The coordinates for Channel 282A at Clarendon are 41-47-21; 79-08-29. We note that Channel 282A can also be used at the site specified in the pending application (BPH-920306MA) for Channel 295A at Clarendon, which are 41-48-50; 79-10-04.

Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture	**CC Docket No. 89-79**
Policy and Rules Concerning Rates for Dominant Carriers	**CC Docket No. 87-313**

MEMORANDUM OPINION & ORDER ON SECOND FURTHER RECONSIDERATION

Adopted: July 16, 1992; Released: August 6, 1992

By the Commission:

I. INTRODUCTION

1. This order addresses petitions seeking reconsideration of those portions of the *Part 69/ONA Order* concerning the new services test of the local exchange carrier (LEC) price cap rules.[1] In this order we clarify and modify the cost support required to tariff new services offered by price cap LECs. First, in cases where a LEC develops a lower-cost version of an existing service, we clarify that the LEC may price that new service at any level below the price of the existing service. Second, we modify our rules so that we no longer require LECs to satisfy the net revenue test as part of the cost showing for new services. We find that the direct cost showing provides sufficient protection against predatory pricing. Finally, we deny, in all other respects, the petitions for reconsideration in this proceeding to the extent that they address the price cap new services test generally.[2]

II. BACKGROUND

2. The price cap rules establish a special set of requirements for the introduction of "new services."[3] In the initial *LEC Price Cap Order*, the primary constraint placed on the price of a new service was that it satisfy a net revenue test.[4] That test, adopted in the AT&T price cap decision, was designed to establish a lower bound on new service prices and thereby ensure that AT&T did not set predatory prices.[5] The test requires a service to be priced at a level that covers its direct costs plus any net losses it creates for a carrier by attracting customers away from the carrier's other services. In the *LEC Price Cap Reconsideration Order*, an upper bound was added to the new service test in response to a petition for reconsideration filed by MCI arguing that the LECs continue to enjoy substantial market power.[6] The interim rule adopted in the *LEC Price Cap Reconsideration Order* limited LECs to prices justified by the pre-price cap cost support rules -- a fully distributed cost showing.

3. The *Part 69/ONA Order* retained an upper bound on the prices of new services, but liberalized the new services test. The order stated that LECs could load overhead on new services in a non-uniform manner, provided they could justify such loadings. The order also offered LECs the opportunity to recover an additional "risk premium" to reflect any unusual riskiness in the development of new services.[7] A LEC is now permitted to justify a higher price for a new service by explaining the need to earn a higher return on its investment commensurate with the higher risk it assumes. In summary, the new services test now serves two goals. It encourages LECs to develop improved versions of existing services and risky new innovative services, and it inhibits predatory pricing.

III. DISCUSSION

4. Most of the parties that filed petitions for reconsideration of new services rules address, in general terms, the need for an upper bound. A few parties focus on specific changes intended to encourage innovation. As discussed below, we conclude that in most cases the new services test appears to further our goals quite effectively. Thus, we conclude that none of the major changes advocated by petitioners are warranted. Nevertheless, after careful examination of the record we have determined that we should clarify and modify certain limited aspects of the test, and we discuss these changes in sections III.B.&C., below.

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[1] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order*). While the *Part 69/ONA Order* combined these two dockets, henceforth they will be treated separately.

[2] We will discuss separately petitions for reconsideration that address ONA-related issues of the *Part 69/ONA Order*.

[3] The *LEC Price Cap Order* defines new services as services that add to the range of options already available to customers. A new service may, but need not, include a new technology or functional capability. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6824 para. 314 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), modified on recon. 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), further modified 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order*), appeal docketed, D.C. PSC v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

[4] *LEC Price Cap Order*, 5 FCC Rcd at 6825 paras. 319-321.

[5] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order & Second Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 4 FCC Rcd 2873, 3128 para. 531, 3266 para. 822 (1989) (*AT&T Price Cap Order*).

[6] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2693-2695.

[7] *Part 69/ONA Order*, at 4531 paras. 43-44.

A. General New Service Issues

5. *Pleadings.* Six Bell Operating Companies (BOCs) and Southern New England Telephone (SNET) argue that the upper bound of the new services test places an unnecessary and unreasonable constraint on their pricing flexibility.[8] GTE, Pacific, and USTA contend that there is no record evidence or reasoned analysis for believing that LECs have significant market power in the pricing of new services.[9] Ameritech argues that if the Commission is unwilling to remove the upper bound on all new services, it should at least eliminate the upper bound on the prices of those LEC services introducing "truly new" functionalities that do not replace or limit use of existing services.[10] Ameritech, with the support of SNET and US West, argues that LECs have no market power with respect to such "truly new" services.[11] A number of LEC customers respond, however, that the LECs still enjoy significant market power in their markets, and that an upper limit is appropriate even for truly new services.[12]

6. *Decision.* The petitioners repeat arguments that we considered and rejected in the *Part 69/ONA Order*. Given the lack of new facts or analysis, we decline to reverse our decision imposing an upper bound on new services, although we make certain adjustments as described below. We also conclude that Ameritech's proposal with respect to "truly new" services is unworkable, as Ameritech does not explain how we would be able to distinguish "truly new" from "new" services. Ameritech also fails to explain why the existing risk premium does not create a sufficient incentive for LECs to develop "truly new" services. Therefore, we continue to believe that the existing flexible cost-based new services test serves the public interest for the reasons we articulated in the *Part 69/ONA Order*. We find that it carefully balances the interests of LECs and their customers. The test grants LECs the flexibility to set prices at levels that are efficient, encourages innovation, and protects LEC customers against unreasonably high prices. We conclude that we should maintain the rules we adopted there, subject to the clarification and modification discussed below.

B. Encouraging New Versions of Existing Services

7. *Pleadings.* NYNEX states that it may not be possible to meet the net revenue test and still comply with the cost-based upper bound in certain circumstances. NYNEX requests that the Commission resolve the conflict by permitting LECs to price new services above the levels required to satisfy the net revenue test, and thus create a positive incentive for LECs to improve existing services.[13] Southwestern Bell is also concerned about losing contributions to overhead if it is not permitted to pass the net revenue test.[14] It urges that it be allowed to introduce evidence of appropriate levels of contribution, as well as total costs, to justify new service rate levels. MCI responds that the net revenue test was only intended as a check on unreasonably low predatory prices, and thus should not justify higher prices.[15] NYNEX answers that it has no incentive to offer a new service unless the service generates net revenue.[16]

8. *Decision.* In the *Part 69/ONA Order*, we imposed an upper bound on the prices of new services to prevent the LECs from pricing new services at levels that are unreasonably high.[17] At the same time, we recognized the need to give LECs a sufficient incentive to develop new services. Thus we never intended the upper bound standard to cause LECs to lose revenue by introducing a new service. NYNEX has described circumstances in which it believes requiring compliance with the upper bound would produce such an outcome. We take this opportunity to clarify the application of the new services test in the circumstances described by NYNEX.

9. NYNEX and Southwestern Bell's concerns appear to be illustrated by the following example. Suppose a LEC has developed a new service with direct costs of 3 units that is a superior substitute for an existing service with direct costs of 6 units. If the existing service was priced at 8 (representing a 2/6 or 33 percent overhead loading factor), NYNEX appears to fear that under the existing rules, the LEC must price the new service based on a 33 percent loading factor or at a rate of 4. However, a price of 4 units could leave the LEC with a net revenue loss by providing only 1 unit of contribution to overhead per unit of sale compared to the 2 units of contribution to overhead per unit of sale provided by the existing service. The *Part 69/ONA Order* already states that LECs may use non-uniform overhead loadings if they can justify the deviations from uniform loadings; we now expressly recognize that a LEC's need to price a new service so that it breaks even is an acceptable justification for non-uniform overhead loadings.

10. NYNEX also argues that the opportunity to set a price just high enough to break even does not provide LECs with a positive incentive to innovate, but merely gives LECs assurance that they will not be worse off if their new services succeed. In the situation in which a LEC develops a new higher cost version of or close substitute for an existing service, the LEC's incentive to innovate is provided by its opportunity to secure a uniform level of loadings on a higher base of direct costs. But in the situations in which a LEC develops a close substitute for an existing service with lower direct costs, permitting the LEC to price the new service to allow the LEC to break even does not provide a positive incentive for the LEC to introduce the new service. We now clarify our rules so that LECs recognize that they may set a price for the new service above the break-even point (as defined by the point where net revenues would be zero), and retain a share of the benefits they create by developing new services.

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[8] Ameritech Pet. passim; BellSouth Pet. at 5-7; NYNEX Pet. at 22-23 and app.; Pacific Pet. at 13-16; SNET Opp. at 4; SW Bell Opp. at 10, 14-16; USWest Opp. at 8.

[9] GTE Pet. at 14-20; Pacific Pet. at 15-16; USTA Opp. at 10.

[10] Ameritech Pet. passim.

[11] SNET Opp. at 5; US West Opp. at 7.

[12] CONAP Opp. at 14-16; GSA Opp. at 3-4; MCI Opp. at 13-20; WilTel Opp. at 10.

[13] NYNEX Pet. at 21.

[14] Letter from William A. Blase, Southwestern Bell, to Donna Searcy, filed Jan. 9, 1992.

[15] MCI Opp. at 14-24.

[16] NYNEX Reply at 3-8.

[17] 6 FCC Rcd at 4531 para. 39.

11. We believe that the simplest, most effective way to make this clear is to state that we will consider non-uniform overhead loadings presumptively reasonable whenever a LEC uses them to justify the introduction of a new service at a level below the imputed "old" price of the service from which the new service is attracting customers.[18] We reach this decision only after noting that such a rule will ensure that LEC customers will be better off in at least one way, if not two. First, customers will benefit because the price of the new service will be below that of the old one. Second, customers will benefit from any improvements in the quality of service.[19]

C. The Net Revenue Test and the Lower Bound

12. As discussed earlier, the net revenue test was initially incorporated into the LEC price cap new services test as a way to ensure that LECs did not engage in predatory pricing. The subsequent requirement that LECs submit cost support for new services, including direct costs and overhead loadings, however, rendered the net revenue test superfluous as a check on predatory pricing. Once a LEC is required to submit information on direct costs, the requirements that price exceed direct costs will prevent predatory pricing. Therefore, in an effort to eliminate unnecessary filing requirements, we modify our rules so that they no longer require LECs to satisfy the net revenue test for new service prices. As discussed above, we will permit LECs to use the net revenue analysis to show the price they will need to charge for a new service simply to break even.

D. The Risk Premium

13. To create an incentive for LECs to engage in research and development involving higher risk services, the *Part 69/ONA Order* recognized the need to permit LECs to earn a higher return -- a "risk premium" -- on investments in unusually risky new services. The risk premium was defined as the additional rate of return a LEC needs to justify the development of a particularly risky new service.[20]

14. *Pleadings.* A number of parties disagree with the decision to permit LECs to have an opportunity to earn a risk premium. Ad Hoc argues that the concept was not adequately exposed to comments and makes little sense.[21] Comptel requests that more detail about the risk premium mechanism be provided.[22] MCI acknowledges that adequate notice was provided,[23] but also repeats its earlier position that the 11.25% rate of return used for LECs is an average based on the need for high returns on riskier investments and much smaller returns on much less risky investments.[24] MCI contends that if the high risk investments are to be treated separately, then the blended rate for the remaining, less risky, investments should be recognized as lower than 11.25. MCI would require LECs to file waivers when they sought risk premiums,[25] and CompuServe agrees that LECs should face a very high threshold before they are granted a risk premium.[26]

15. LECs generally support the risk premium, arguing that eliminating it would discourage innovation and that a waiver requirement would create an unnecessary burden.[27] Southwestern Bell agrees that decisions evaluating the riskiness of particular projects are inherently difficult, but states that the Commission has the necessary expertise to make those judgments.[28] Southwestern Bell accuses MCI of pursuing the self-serving goal of seeking to minimize its own costs,[29] while US West observes that MCI's criticism to this price cap mechanism should be considered in the context of MCI's general opposition to price caps.[30]

16. NYNEX contends that LECs must be allowed to earn revenues that cover the cost (including the risk) of both the capital they invest in a project and the one-time expenses they incur so as to give incentives more comparable to those provided in the marketplace. NYNEX states that the risk premium approach of the *Part 69/ONA Order* diminishes LEC incentives to innovate by denying LECs the opportunity to earn a return on a number of categories of expenditures that have traditionally been treated as expenses rather than investments.[31] NYNEX argues that large preliminary expenses are frequently required over a long period of time in association with the introduction of a new service -- including research and development, product planning, and marketing. NYNEX contends that when its preliminary expenses are actually subject to the unusual risk that justifies a risk premium, it also deserves to be compensated with a risk premium for the preliminary expenses that could be lost. SNET and US West support NYNEX's proposed approach.[32]

17. *Decision.* After carefully reviewing the pleadings on the risk premium mechanism, we conclude that our adoption of the risk premium is consistent with the requirements of the Administrative Procedure Act and that the current version of the mechanism best serves the public interest. Based on a proposal in NYNEX's original com-

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[18] In some cases it will be easy to identify an "old service" price. If all of the customer migration to the new service, which the LECs currently measure as part of the net revenue test, is expected to come from a single old service, the old price is the price of that old service. If, however, LEC customers are expected to migrate from multiple services, then LECs should compute a simulated old price based on a weighted average of the prices of the old services from which the customers are expected to migrate, just as they do in justifying a price cap filing for a restructured service.

[19] While we believe this should be the general rule, we anticipate that we may need to designate exceptions in the future. We expect that any exceptions will be identified by Commission order.

[20] The risk premium discussed here would be added to the 11.25-percent return earned by LECs on their investment, but only for new services that posed unusual risks. The risk premium for new services should not be confused with the risk premiums discussed in Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, Notice of Proposed Rulemaking and Order, CC Docket No. 92-133, FCC 92-256, adopted June 18, 1992. In that proceeding, risk premiums would be added to the "no risk" treasury certificate interest rate and would apply to total LEC investments.

[21] Ad Hoc Pet. at 14-20.

[22] Comptel Opp. at 8-10.

[23] MCI Opp. at 7-8.

[24] MCI Pet. at 27-28.

[25] MCI Pet. at 29.

[26] CompuServe Pet. at 12.

[27] SW Bell Opp. at 11; SNET Opp. at 6-7.

[28] SW Bell Reply at 3.

[29] SW Bell Opp. at 12-13.

[30] US West Opp. at 9-10.

[31] NYNEX Pet. at 19-20.

[32] NYNEX Pet. at 19-20; SNET Opp. at 5-6; US West Opp. at 9.

ments, the "risk premium" concept was the logical outgrowth of our proposal to reconcile the goals of encouraging LEC innovation by providing pricing flexibility and yet capping LEC prices at reasonable levels. This is clear from the record. In 1989, in our *LEC Price Cap NPRM*, we observed that there was a danger that LECs would charge unreasonably high prices for new services, but we also sought to provide LECs with the pricing flexibility that would encourage innovation.[33] We tentatively concluded that we would be able to ensure the reasonableness of LEC rates for new services without the need for an explicit upper bound, since we would be able to evaluate the cost data submitted by LECs as part of the net revenue test. We specifically asked for comments on this conclusion.

18. In the *LEC Price Cap Order* we affirmed the tentative conclusion not to adopt a definite upper bound. MCI then petitioned for reconsideration of the need for a more definite ceiling.[34] MCI argued that we had failed to address the monopoly pricing issues of LEC new services and recommended that we adopt a ceiling at the authorized rate of return for rate of return carriers. The LECs responded by opposing this ceiling. The *Part 69/ONA* proceeding also presented the issue of fostering innovation while protecting customers against unreasonable rates. We therefore combined the records of the *Price Cap* and *Part 69/ONA* dockets in order to resolve issues related to the new services test in a comprehensive manner in the *Part 69/ONA Order*.

19. During the *Part 69/ONA* proceeding, NYNEX offered a compromise proposal. It stated that it would not object to a cap on new services if the cap permitted LECs to secure a reasonable return on total investment and recognized the higher risk associated with revenue-producing, as contrasted to cost-cutting, investments.[35] After careful consideration, we found this to be a reasonable compromise and a logical outgrowth of our proposal to find a price ceiling that did not constrain innovation. Thus, we adopted a flexible cost-based upper bound that permitted both non-uniform overhead loadings and risk premiums when they could be justified. In summary, as MCI states, commenters have had an adequate opportunity to review this issue.[36] The risk premium mechanism adopted in the *Part 69/ONA Order* was a logical outgrowth of the Commission's proposal in the price cap notices of proposed rulemaking, and therefore, Administrative Procedure Act notice requirements have been satisfied.[37]

20. We decline Comptel's request to specify the workings of the risk premium mechanism in greater detail at this time. We have provided a sufficient framework that fully describes the essence and basics of the process, and we prefer to develop any additional details that may be necessary as the mechanism is employed. We also reject MCI's proposal that we require waivers for this process. We believe that we have sufficient safeguards built into the process so that waivers are unnecessary. A waiver requirement would also be more time consuming and thus particularly detrimental to a process designed to foster rapid innovation.

21. Furthermore, we decline to accept MCI's suggestion that we readjust the 11.25% rate of return on investments if we award risk premiums to LEC services with above-average risks. MCI's position would be reasonable if we expected to award risk premiums to LECs for the services they currently offer that are more risky than average while continuing to treat 11.25% as the average return for the remaining less-risky-than-average services. However, we will not grant a risk premium to LECs for services that are merely more risky than the average service that they now introduce. We will only grant risk premiums to those services that are so "unusually risky" that a LEC would not introduce the services if the LEC were limited to the current standard 11.25% return. These services warranting a risk premium would earn a higher rate of return if they were successful, but they would also fail to earn anything if they did not reach the market. Moreover, we will carefully evaluate carrier requests for risk premium treatment to ensure that the mechanism is not abused. Thus, we conclude that the risk premium mechanism adopted in the *Part 69/ONA Order* will fairly compensate LECs for developing unusually risky services, and will not result in over-recovery by the LECs.

22. Finally, we decline to adopt NYNEX's proposal that we revise the rules to permit the risk premium to apply to expenses incurred in the development of risky new services. First, we note that prices set in accordance with current price cap rules, including the existing new services test, are already designed to generate reasonable funds to finance LEC research and development. Second, there is a problem with applying the risk premium to expenses: the risk premium should only be applied to the portion of the expenses that is truly at risk of being lost, that is, the portion that is unsalvageable. While it may be somewhat difficult to determine what portion of a capital investment is unsalvageable -- and thus entitled to earn a risk premium -- the difficulty is qualitatively greater with respect to expenditures on research and development and marketing. It would likely be particularly difficult to quantify which portion of the latter expenditures would actually be lost if a new service failed, and which expenditures produced ideas or other results that would be salvageable for future efforts. Given these difficulties, we conclude that the substantial efforts required to apply a risk premium to expenses are not justified. Therefore, we deny NYNEX's request to expand the scope of expenditures eligible for risk premiums.

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[33] Policy and Rules Concerning Rates for Dominant Carriers, Report & Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 4 FCC Rcd 2873, 3266 para. 823 (1989).

[34] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2693-94.

[35] *Part 69/ONA Order*, at 4531 para. 37.

[36] MCI Opp. at 7-8.

[37] *See, Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991); *Public Service Commission of D.C. v. FCC*, 906 F.2d 713 (D.C. Cir. 1990). As the court has noted, to hold that notice was not adequate because the specific proposal adopted was not explicitly presented in the initial notice would "lead to the absurdity that... the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *Natural Resources Defense Council, Inc. v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988) citing *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.15 (D.C. Cir. 1973). *See also, Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

IV. CONCLUSION AND ORDERING CLAUSES

23. In summary, we conclude that our LEC price cap new services test provides an adequate check on both unreasonably high and predatorily low prices and encourages vigorous development of new and innovative services. The clarification we provide in this order concerning the pricing of new services with lower direct costs than the services they displace will further strengthen LECs' incentives to innovate. In addition, the decision to eliminate the net revenue test requirement from the new services test will make the new services test less burdensome for LECs. We do not believe that any of the other suggestions offered by petitioners would improve the new services test.

24. Accordingly, IT IS ORDERED that, pursuant to Sections 151, 154(i) and (j), 201-205, 303(r), and 405 of the Communications Act, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r), and 405, Part 61 and Section 61.49 of the Commission's rules, 47 C.F.R. Part 61, § 61.49 IS AMENDED as set forth in Appendix A, effective 90 days after publication in the Federal Register.

25. IT IS FURTHER ORDERED that the petitions for reconsideration are GRANTED to the extent described herein and are otherwise DENIED with respect to issues relating to CC Docket No. 87-313.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Part 61, is amended as follows:

PART 61 - TARIFFS

1. Section 61.49 is amended by revising paragraph (g)(1) to read as follows:

* * * * *

(g)(1) Each tariff filing by a dominant interexchange carrier, as specified by Commission order, that introduces a new service that will later be included in a basket must be accompanied by cost data sufficient to establish that the new service, and each unbundled element thereof, will generate a net revenue increase -- measured against revenues generated from all services subject to price cap regulation, and calculated based upon present value -- within the lesser of a 24-month period after an annual price cap tariff including the new service takes effect, or 36 months from the date the new service becomes effective. Each carrier making such a tariff filing must, at the time the new service is incorporated into the price cap index, submit data sufficient to make the API and PCI calculations required by §§ 61.46(b) and 61.44(c) of this part, and, as necessary, to make the SBI calculations provided in § 61.47 (b) or (c) of this part.

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APPENDIX B

LIST OF COMMENTERS

1. Petitions for Reconsideration

1. Ad Hoc Telecommunications Users Committee and the Coalition of Open Network Architecture Parties (Ad Hoc/CONAP)
2. Ameritech Operating Companies (Ameritech)
3. BellSouth Telephone Companies, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth)
4. CompuServe
5. GTE Service Company and its affiliated domestic telephone operating companies (GTE)
6. MCI Telecommunications Corp. (MCI)
7. NYNEX Telephone Companies (NYNEX)
8. Pacific Bell (Pacific)

2. Oppositions to Pets. for Reconsideration

1. Ad Hoc/CONAP
2. Competitive Telecommunications Assoc. (CompTel)
3. General Services Administration (GSA)
4. MCI
5. Pacific
6. Southern New England Telephone Company (SNET)
7. Southwestern Bell Telephone Company (SW Bell)
8. United States Telephone Assoc. (USTA)
9. US West Communications (US West)
10. Williams Telecommunications Group (WilTel)

3. Replies to Opps. to Pets. for Reconsideration

1. Ad Hoc/CONAP
2. Ameritech
3. BellSouth
4. MCI
5. NYNEX
6. SW Bell

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-277

In re Applications of

GLORIA BELL BYRD	File No. BPH-880912MC
ORMOND BROADCASTING, INC.	File No. BPH-880915MI
DEHARO RADIO, LTD., A FLORIDA LIMITED PARTNERSHIP	File No. BPH-880915MJ
O. B. S. RADIO LIMITED PARTNERSHIP	File No. BPH-880915MN
B H BROADCASTING, INC.	File No. BPH-880915MQ
MCFAYDEN BROADCASTING LIMITED PARTNERSHIP	File No. BPH-880915MR
AGAPE OF CENTRAL FLORIDA, INC.	File No. BPH-880915MT
GREENE COMMUNICATIONS, LTD.	File No. BPH-880915MW

For Construction Permit for
New FM Station, Channel 239A,
Ormond-By-The-Sea, Florida

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 1992; Released: August 20, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. In an *Initial Decision*, 7 FCC Rcd 2861 (1992), Administrative Law Judge Edward Luton granted the construction permit application of McFayden Broadcasting Limited Partnership (McFayden) for the above-captioned facility at Ormond-By-TheSea, Florida and denied the mutually exclusive applications. Exceptions have been filed by certain of the losing applicants. However, AGAPE of Central Florida, Inc. (AGAPE) decided not to pursue the case further and has joined with McFayden in a Joint Petition For Approval Of Settlement Agreement, filed June 8, 1992. The settlement agreement attached to the joint petition contemplates the dismissal of AGAPE's application in return for payment by McFayden of AGAPE's legitimate and prudent expenses in an amount not to exceed $25,000. Comments in support of the joint petition were filed by the Mass Media Bureau on June 23, 1992.

2. The Joint Petition fully complies with the provisions of 47 USC § 311 (c) and 47 CFR § 73.3525 that govern settlement agreements. The agreement contains declarations from the principals setting forth the reasons why the agreements are in the public interest, and stating that their applications were not filed for the purpose of reaching or carrying out any settlement agreement. Additionally, AGAPE has declared under penalty of perjury that the proposed payment is less than its legitimate and prudent expenses incurred in the prosecution of the application, and has submitted documentation to support its claim. Approval of the settlement agreement would simplify the proceeding by reducing the number of applicants filing exceptions; thus, serving the public interest by conserving the resources of the Commission and the parties.

3. ACCORDINGLY, IT IS ORDERED, That the Joint Petition For Approval Of Settlement Agreement filed by McFayden Broadcasting Limited Partnership and AGAPE of Central Florida, Inc. on June 8, 1992, as supplemented on June 9 and June 18, 1992 IS GRANTED, and the attached settlement agreement IS APPROVED; and that the application of AGAPE of Central Florida, Inc. (File No. BPH-880915MT) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-166

PUBLIC NOTICE

Released: August 7, 1992

FCC ASKS FOR COMMENTS REGARDING THE ESTABLISHMENT OF AN ADVISORY COMMITTEE TO NEGOTIATE PROPOSED REGULATIONS

1. The Commission is considering establishing an Advisory Committee to negotiate regulations defining the technical rules appropriate to the provision of mobile-satellite services (MSS) in the 1610-1626.5 MHz and 2483.5-2500 MHz frequency bands subject to the adoption of a *Report and Order* allocating this spectrum for MSS services in ET Docket No. 92-28. The negotiations are to assist the Commission in developing regulations that will facilitate the shared use of this spectrum by the maximum number of MSS providers. Any negotiating committee would be created under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, and the Negotiated Rulemaking Act of 1990 (NRA), Pub. L. 101-648, November 28, 1990, and would consist of representatives of the interests that will be significantly affected by the outcome of these rules.

2. The Commission has recently proposed to reallocate the 1610-1626.5/2483.5-2500 MHz frequency bands to MSS on a co-primary basis with other allocated services in those bands. *Notice of Proposed Rulemaking*, FCC 92-358 (adopted August 4, 1992). This domestic allocation would conform with the international allocation that was made at the World Administrative Radio Conference, 1992 (WARC-92). Six applications have been filed seeking authority to construct and launch MSS systems in these bands. Five applicants propose low-Earth orbit (LEO) systems; one proposes a geostationary-satellite orbit (GSO) system. The only domestic user in the bands is the National Academy of Sciences, which provides radio astronomy service in the 1610.6-1613.8 MHz band segment on a secondary basis. Geostar Positioning Corporation (Geostar) is authorized to implement a radiodetermination satellite service (RDSS) system in the entire bandwidth, but the system has not been built and Geostar is in the liquidation phase of bankruptcy.

I. REGULATORY NEGOTIATION

3. Regulatory negotiation is a technique through which the Commission hopes to develop better regulations that may be implemented in a less adversarial setting. Negotiations are conducted through an Advisory Committee chartered under FACA. The goal of the Committee is to reach consensus on the language or substance of appropriate rules. If a consensus is reached, it is used as the basis of the Commission's proposal. If a consensus is not reached, majority and minority input may be used by the Commission in ultimately proposing regulations. All procedural requirements of the Administrative Procedure Act (APA) and other applicable statutes continue to apply.

4. When making a determination regarding the suitability of a proceeding for the negotiated rulemaking process, the Commission must consider whether:

(a) there is a need for the rule,

(b) there are a limited number of identifiable interests that will be significantly affected by the rule,

(c) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (1) can adequately represent the identifiable interests and (2) are willing to negotiate in good faith to reach a consensus on the proposed rules,

(d) there is a reasonable likelihood that a committee will reach a consensus on the proposed rules within a fixed period of time,

(e) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of final rules,

(f) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee, and

(g) the agency will, to the maximum extent possible consistent with the legal obligations of the agency, use the consensus of the committee with respect to the proposed rules as the basis for the rules proposed by the agency for notice and comment. NRA § 3, 5 U.S.C. §583(a).

II. SUBJECT AND SCOPE OF RULE PROPOSED FOR NEGOTIATED RULEMAKING

5. The Commission is proposing that the technical regulations to govern the provision of MSS in the 1610-1626.5/2483-2500 MHz frequency bands be developed through negotiation. We believe that the selection criteria listed above are met. Technical regulations are needed to establish and govern this service, should we adopt the allocations proposed in the *NPRM*, *supra*, in a manner that maximizes use of the spectrum and protects existing users from harmful interference. Affected interests are relatively small in number and these interests are likely to be adequately represented on any negotiating committee. Further, while we recognize that several of the applicants' proposed systems may be technically incompatible, we believe it is reasonably likely that the Committee could reach a consensus with respect to sharing criteria in a reasonable amount of time. We will use the consensus of the Committee as the basis for our rules to the extent possible. Nonetheless, if a consensus cannot be achieved, the majority and minority input will be considered by the Commission and will serve to expedite the issuance of a notice of proposed rulemaking and a final order. Finally, the Commission has adequate resources to devote to the negotiations.

6. The Commission has identified the following issues that should be addressed in the negotiations and incorporated in the proposed rules developed by the Committee:

(a) what technical rules should be adopted for this service so as to maximize the sharing of the spectrum and the capacity for multiple entry, and

(b) what technical rules should be adopted in order for this service to co-exist with other allocated services.

Other issues may be included by the parties. All proposals must comply with International Telecommunication Union (ITU) treaty obligations.

III. POTENTIAL INTERESTS AND PARTICIPANTS

7. The Commission has identified the following interests as those likely to be significantly affected by the MSS service rules:

(a) applicants to provide MSS in the affected bands, and

(b) existing users of the bands.

8. The following have initially been identified as potential interests should the Commission proceed with a negotiated rulemaking: American Mobile Satellite Corporation, Constellation Communications, Inc., Ellipsat Corporation, Loral Cellular Communications, Inc., Motorola Corporation, TRW, Inc., the National Academy of Sciences, and the Domestic Facilities Division, Common Carrier Bureau, Federal Communications Commission.

IV. FORMATION OF THE NEGOTIATING COMMITTEE

A. Procedure for Establishing an Advisory Committee

9. Under FACA, an Advisory Committee may be established only after consultation with the General Services Administration (GSA) and the filing of a charter. The Commission will prepare a charter and initiate the requisite consultation process prior to formation of the Committee and the commencement of negotiations.

B. Participants

10. The number of participants in the group is estimated to be about 12 and should not exceed 25. A number larger than this could make it difficult to conduct efficient negotiations. Each interest will have the opportunity to be adequately represented, although this does not necessarily mean that each potentially affected entity will have its own representative. Further, we must be satisfied that the group, as a whole, reflects a proper balance and mix of interests.

11. Entities that will be significantly affected by the proposed rules and which believe that their interests will not be adequately represented by any entity specified in paragraph 8 above, may apply for, or nominate another entity for, membership on the Committee. Each application for nomination must include:

(a) the name of the applicant or nominee and a description of the interests the entity will represent,

(b) evidence that the applicant or nominee is authorized to represent parties related to the interests the entity proposes to represent,

(c) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rules under consideration,

(d) the reasons that the entities specified in paragraph 8 do not adequately represent the interests of the entity submitting the application or nomination.

12. If, in response to this *Notice*, any additional entities request membership or representation in the negotiating group, the Commission will determine whether that entity should be added to the group. The Commission will make that decision based on whether the entity would be substantially affected by the rule and whether that entity is already adequately represented in the negotiating group.

C. Agenda

13. If the Commission decides to establish a negotiating committee and its charter is approved, it is expected that the Committee's first meeting will take place in November 1992, at the Commission's offices, Washington, D.C., at a building, room, date, and time that will be announced. At this initial meeting, the committee will complete action on all procedural matters and establish a target date for submission of its recommendations. We expect that the target date would be no later than March 1, 1993. We anticipate publication of a notice of proposed rulemaking not later than May 1993.

V. NEGOTIATION PROCEDURES

14. The following procedures and guidelines will apply to the Committee, if formed. These procedures may be modified, however, after reviewing the comments received in response to this *Notice* or during the negotiation process.

A. Facilitator

15. The Commission will nominate a person to serve as a neutral facilitator for the negotiations of the Committee, subject to the approval of the Commission by consensus. The facilitator will not be involved in the substantive development of the regulations. The facilitator's roles are to (1) chair negotiating sessions, (2) help the negotiation process run smoothly, (3) help participants define and reach a consensus, and (4) manage record-keeping and minute-keeping.

B. Good Faith Negotiations

16. Each organization -- including the Commission -- must designate a qualified individual to represent its interests. Thomas S. Tycz, Deputy Chief, Domestic Facilities Division, Common Carrier Bureau, will be the Commission's representative.

C. Meetings and Compensation

17. Meetings will be held in the Washington, D.C. area at the convenience of the Committee. The Commission, if requested, will provide the facilities needed to conduct the meetings, and will provide any necessary technical support. Private sector members of the Committee will serve without government compensation or reimbursement of expenses. Private sector members will not be special government employees for any purposes whatsoever.

D. Committee Procedures

18. Under the general guidance and direction of the facilitator, and subject to any applicable legal requirements, the members will establish the procedures for committee meetings that they consider most appropriate.

E. Consensus

19. The goal of the Committee is consensus. We expect the participants to fashion their own working definition of this term. In the event the Committee is unable to reach a consensus, majority and minority reports may be submitted and the Commission will develop its own approach. Parties to the negotiation may withdraw at any time. If this happens, the remaining committee members and the Commission will evaluate whether the Committee should continue.

F. Record of Meetings

20. Pursuant to FACA, the Committee will keep a record of all committee meetings. This record will be placed in the public docket for this rulemaking. The Commission will announce committee meetings in the Federal Register. These meetings will be open to the public.

VI. CONCLUSION

21. The Commission requests public comment on whether: (1) it should establish a Federal Advisory Committee, (2) it has properly identified the interests that are significantly affected by the key issues listed above, (3) the proposed committee membership reflects a balanced representation of these interests, and (4) regulatory negotiation is appropriate for this rulemaking.

22. Pursuant to the applicable procedures set forth in Section 4(c) of the Negotiated Rulemaking Act of 1990, 5 U.S.C. §584(c), interested parties may file comments and applications for Committee membership on or before **September 14, 1992**. Comments and/or applications should be sent to the Office of the Secretary, CC Docket No. 92-166, Federal Communications Commission, Washington, D.C. 20554. Comments and applications will be available for public inspection during regular business hours in the Dockets Public Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

23. For further information pertaining to the establishment of the negotiation committee and associated matters, contact Fern J. Jarmulnek, Satellite Radio Branch, 2025 M Street, N.W., Washington, D.C. 20554, (202) 634-1682.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of

HEIDI DAMSKY	File No. BPH-880816MW
WEDA, LTD.	File No. BPH-880816NR
HOMEWOOD PARTNERS, INC.	File No. BPH-880816NU

For Construction Permit for a
New FM Station on Channel 247A
in Homewood, Alabama

Appearances

Lauren A. Colby, on behalf of Heidi Damsky; *Stephen Diaz Gavin* and *Thomas L. Siebert*, on behalf of WEDA, Ltd.; *John F. Garziglia* and *Howard J. Barr*, on behalf of Homewood Partners, Inc.; and *Robert Zauner*, on behalf of the Chief Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: August 10, 1992; Released: August 19, 1992

PRELIMINARY STATEMENT

1. In its *Hearing Designation Order* in this proceeding, *Leibensperger FM, Inc.*, 6 FCC Rcd 788 (1991), the Mass Media Bureau designated 13 applicants for comparative hearing. Since the release of the *HDO*, 10 of those applicants have either voluntarily requested dismissal or have been dismissed pursuant to an adverse motion.[1] Heidi Damsky (Damsky), WEDA, Ltd. (WEDA) and Homewood Partners, Inc. (HIP)[2] are the remaining applicants for authority to construct and operate a new FM station on Channel 247A at Homewood, Alabama.

2. The issues designated in the *HDO* with respect to the remaining applicants are as follows:

> To determine with respect to WEDA, Ltd. and Homewood Partner, whether the applicants are financially qualified.
>
> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The areas and populations to be served by the competing applicants and the availability of other primary aural services is also to be considered under the standard comparative issue. *HDO* at ¶ 18. In this regard, the applicants entered into a Joint Engineering Exhibit regarding coverage, which was received in evidence as Joint Ex. 1 (Tr. 149-151).

3. Summary decision was rendered in favor of HPI on the financial qualifications issue by the Presiding Judge's *Order*, FCC 91M-2923, released September 25, 1991.

4. By *Order*, FCC 91M-2870, released September 19, 1991, the Presiding Judge specified the following issues against Damsky:

> To determine whether Heidi Damsky is financial qualified to construct and operate the station for three months without revenue.
>
> To determine in light of the above whether Heidi Damsky has lacked candor and/or made misrepresentations to the Commission in her application.
>
> To determine in light of the above whether Heidi Damsky is fit to be a Commission licensee.

5. Pursuant to *Order*, FCC 91M-546, released, February 11, 1991, a prehearing conference was held on April 23, 1991. Hearing sessions were held on September 23, 24, 25, 26, and 27, 1991 and November 4, 1991. The record was closed on November 4, 1991. *See, Order*, FCC 91M-3231, released November 7, 1991. Proposed findings of fact and conclusions of law were filed December 19, 1991; replies were filed January 13, 1992.

FINDINGS OF FACT
Qualifications Issues
Heidi Damsky
Financial And Misrepresentaiton Issue

Estimated Costs

6. Damsky filed her application on August 16, 1988. (Tr. 1127). As of that date, Ms. Damsky had no written budget for her Homewood station. (Tr. 165-266, 1127). She merely had a "ballpark" estimate that it would cost around $300,000 to construct the station. (Tr. 269, 1129).[3] This "ballpark" estimate was provided by Williams Benns, her consulting engineer. (Tr. 266, 269, 1127). She was not given any documentation for the $300,000 figure (Tr. 1130).

7. Benns did not break this figure down between construction costs and operating costs (Tr. 1129-1130). Benns did not itemize what was included in this cost figure (Tr. 1146). Damsky has no knowledge of what is contained within the $300,000 cost figure (Tr. 1146). Damsky played no role in determining her costs (Tr. 1139).

8. Ms. Damsky did not discuss with Benns the specific items of equipment that would be needed (Tr. 268). She did not discuss with Benns: whether the transmitter site would be leased or purchased (Tr. 269); the cost to construct a transmitter shed (Tr. 1128); the cost estimate for her antenna tower (Tr. 1128-1129); what the operating expenses of the station would be for the first three months (Tr. 269); how many employees the station would have (Tr. 269); studio remodeling costs (Tr. 1146); or electricity costs (Tr. 1146). Prior to certification she did not know

what her tower site would cost (Tr. 1152). She also did not know if she would be purchasing the site or leasing the site (Tr. 1152). Damsky's proposal calls for a stand alone tower (Tr. 1128-1129). Damsky did not learn this until preparing for her deposition in July of 1991 (Tr. 1128-1129).

9. Ms. Damsky does not know what positions her employees will hold at the station (Tr. 1132). She has never made an investigation into salaries for broadcast employees in the Birmingham market (Tr. 1149). She never made an investigation into the going rate for studio or office space in Birmingham (Tr. 1150) Ms. Damsky has not considered what type of insurance she might need at the station and has made no investigation into the cost of general business insurance (Tr. 1151). Ms. Damsky has never visited her tower site (Tr. 1151-1152). She does not know if access roads must be built or if power and/or telephone lines to the site will have to be installed (Tr. 1151-1152).

Funds To Meet Estimated Costs

10. Ms. Damsky's certification is based upon a conversation with her husband in which she casually asked whether "we had enough to do this" (Tr. 271, 1111). She told him that it would cost approximately $300,000 to build the station (Tr. 1139).

11. Mr. Damsky did not view his wife's request in terms of liquid or non-liquid assets (Tr. 1109-1110). Mr. Damsky assured her that they had enough to do the project based upon his knowledge of their financial situation, his banking relationship and the condition of Damsky Paper Company (Tr. 1109-1110).

12. Mr. Damsky had a financial statement dated as of June 1, 1988 (Damsky Ex. 10, p. 3). Ms. Damsky did not review this or any other financial statement prior to certifying to her financial qualifications (Tr. 275, 1136). Mr. Damsky did not provide Ms. Damsky with any information contained on the financial statement (Tr. 1100, 1112). Ms. Damsky did not ask for this information (Tr. 1100).

13. Mr. Damsky's June 1, 1988 Financial Statement, which claims total assets of $809,000[4] and a net worth of $759,000 as of June 1, 1988, lists the following "liquid" assets:

Item	Amount
Cash (on hand and in banks)	$ 16,500
Marketable Securities	103,000
TOTAL	$119,500

(Damsky Ex. 10, p. 3). The statement also lists the following non-liquid assets:

Item	Amount
Non-marketable Securities	$ 20,000
Real Estate	95,000
"Other" Assets (Total	499,500

(Damsky Ex. 10, p. 3).

The "Other Assets" were the following:

Item	Amount
Overton Road (net)	$ 45,000
K-Mart (net)	97,500
Parisian of Huntsville	52,000
Pension Plan	65,000
Profit Sharing Plan	100,000
Damsky Paper Co. Stock	140,000

(Damsky Ex. 10, p. 3). Damsky has offered no valuations or appraisals for the non-liquid assets. Mr. Damsky prepared the statement in 1988. (Tr. 1087).

14. Martin Damsky testified that the "Cash" entry constituted moneys on deposit in banks at the time. (Tr. 1087). The "Marketable Securities" item consisted of stocks and bonds held in a Shearson, Lehman account. (Tr. 1090-1091). His valuation of the Marketable Securities had been based upon a review of his most current brokerage account statement. (Tr. 1091-1092). No documents were proffered that identified these securities (Tr. 1090).

15. The entry for non-marketable securities refers to stock in a company known as Comperonix (Tr. 1101). Mr. Damsky purchased this through a private placement (Tr. 1101). No public market existed for this stock in 1988 (Tr. 1101-1102).

16. The $95,000 entry for real estate reflects a lake house and a condominium (Tr. 1092). Neither Mr. Damsky nor Mrs. Damsky consider the lake house or the condominium to be a liquid asset (Tr. 1092-1093, 1120, 1141).

17. Overton Road was a strip shopping center in which Mr. Damsky was a limited partner. (Tr. 1093). There were no offers to Mr. Damsky in 1988 for that interest. (Tr. 1093, 1103). There was no public market for the Overton Road private placement in 1988. (Tr. 1102).

18. The "Parisian of Huntsville (net)" entry is also a limited partnership (Tr. 1103). Mr. Damsky purchased this interest through a private placement (Tr. 1103). No public market existed for this interest (Tr. 1103). Mr. Damsky had no intention of parting with this investment (Tr. 1103-1104).

19. K-Mart was a real estate limited partnership and tax shelter. (Tr. 1104). He had no offers in 1988 to purchase his K-Mart interest. (Tr. 1104).

20. Martin Damsky testified that he could withdraw his Pension Plan interests, subject to tax and penalty that would amount to 40% of the value. (Tr. 1094-1095). As of August 1988, he had provided his wife with no written statement of his willingness to use those Pension Plan funds for the Homewood station. (Tr. 1108).

21. Mr. Damsky claimed that the entry for "Damsky Paper Co. Stock" actually referred to retained earnings of the company, not actual stock. (Tr. 1095, 1112). The financial statement entry referred to his share of the retained earnings. (Tr. 1095). They were on deposit in a bank. (Tr. 1096). Mr. Damsky testified that he could have withdrawn all $140,000. (Tr. 1095). This reflected 20% of the total retained earnings in 1988. (Tr. 1114). Mr. Damsky testified that he had the authority to use all of the $140,000 for

whatever purpose he sought. (Tr. 1114). There were no tax consequences from withdrawal of the retained earnings because they had already been taxed. (Tr. 1115).

22. In 1988, Mr. Damsky was personally liable for between approximately $700,000 and $1,000,000 in credit lines for Damsky Paper Co. (Tr. 1117). Mr. Damsky had provided a personal guarantee for the lines of credit. (Tr. 1118-1119).

23. Mr. Damsky's financial statement shows $50,000 in liabilities (Damsky Ex. 10, p.3). Mr. and Mrs. Damsky's residence is listed as having a value of $150,000, less a mortgage of $40,000 - $60,000 (Damsky Ex. 10, p. 4). This figure is not based on an appraisal (Tr. 1119). This home is listed solely in Ms. Damsky's name (Tr. 1092). Ms. Damsky did not indicate any intention to sell this home.

24. Neither Mr. or Mrs. Damsky supplied a current financial statement. Neither testified about the current status of the items listed in the June, 1988 statement.

WEDA, LTD.
Financial Qualifications

Estimated Costs

25. WEDA's currently estimates that it will cost approximately $422,000 to construct and operate its proposed Homewood FM station for three months without revenues. (WEDA Ex. 6, p. 6).

26. However, WEDA originally estimated that it would cost approximately $392,000 to construct and operate the Homewood station for three months without revenues. (WEDA Ex. 6, p. 2).[5]

27. WEDA's General Partner, Ouida J. Fritschi, testified that to obtain a reliable estimate of costs to construct and operate the station, counsel for WEDA recommended that she contact Stanley J. Karas, a broadcast consultant, about preparation of a projection of the costs to construct and operate WEDA's Homewood station. (WEDA Ex. 6, p. 1; Tr. 336). Fritschi first contacted Karas on or about August 5, 1988. (Tr. 370, 427; Barber Ex. 11, p. 1). Under a cover letter dated August 9, 1988, Karas sent Fritschi a projection of costs to construct and operate the station for three months without revenues. (Barber Ex. 11, p. 1; WEDA Ex. 6, p. 1).

28. Karas estimated that it would cost between $207,000 to $237,000 to construct the station, depending upon equipment needs. (WEDA Ex. 6, p. 1). Karas specifically noted on the summary page of his Proposal that the $30,000 in additional costs would result from satellite and remote equipment if the studio were not located at the transmitter tower site. *Id.* WEDA assumed the higher cost in its estimate to include the extra equipment. *Id.*

29. Fritschi did not discuss specific equipment and construction cost items, including the transmitter site cost, with Karas. (Tr. 370-371). In his Proposal, Karas assumed a lease of a transmitter site and did not include the actual cost of obtaining WEDA's proposed transmitter site. (Tr. 372; WEDA Ex. 6, pp. 1-2). However, the owner of WEDA's transmitter site, Dr. Joseph Rice, informed Fritschi directly that he was not willing to lease the property to WEDA but would be willing to sell the property to WEDA for approximately $125,000 (total purchase price). (WEDA Ex. 6, p. 2). After consultations with communications counsel, Fritschi concluded that WEDA would still specify Rice's property in the application as its transmitter site, but would include the entire purchase price ($125,000) in WEDA's cost estimates. (WEDA Ex. 6, p. 2).

30. Thus, WEDA's originally estimated costs, not including any "cushion" were the following:

Item	Estimated Cost
Land Acquisition	$125,000
Antenna Tower	40,000
Equipment Cost (including Antenna, STL, Studio Equipment)	125,000
Three Months' Operating Costs	72,000
TOTAL ESTIMATED COSTS	$362,000

(WEDA Ex. 6, p. 2).

31. Fritschi decided to include a cushion in the financial cost estimates to account for any unexpected costs. (WEDA Ex. 6, p. 2). In her initial discussions about estimated costs and financial needs with B. Scott Reardon, III, WEDA's Limited Partner, Fritschi set WEDA's estimated cost figure at approximately $392,000 to construct and operate the Homewood station for three months without revenues. (WEDA Ex. 6, p. 2).

32. Subsequent to the issuance of the *HDO* and the specification of a financial issue against WEDA, the applicant reviewed and revised its cost estimates. (WEDA Ex. 6, p. 4).

33. After a review of WEDA's original engineer's technical proposal and the original financial documentation, WEDA concluded that the engineer's original proposal for a "free-standing" antenna tower was not accounted for in the study prepared by Karas, who had budgeted approximately $40,000 for an antenna tower. (WEDA Ex. 6, p. 5). WEDA also concluded that no line item for auxiliary power had been included by Karas, although sufficient reserve funds were available for it. (WEDA Ex. 6, p. 5).

34. WEDA contacted a new engineer, Garrison C. Cavell of the firm of Lahm Suffa & Cavell, who was asked to provide more updated equipment cost estimates for WEDA. (WEDA Ex. 6, p. 5).

35. Cavell estimated that WEDA would have to spend approximately $100,000 to construct a free-standing antenna tower, *i.e.*, approximately $60,000 more than the sum estimated by Karas in his equipment estimate. (WEDA Ex. 6, p. 5).

36. Cavell also advised that auxiliary power generators for WEDA would cost approximately $5,000. (WEDA Ex. 6, p. 5). Although Karas' study included a "miscellaneous" equipment category, there was no specific budget line item for auxiliary power generators. *Id.*

37. WEDA's revised cost estimate, as of March 1991, is the following:

Item	Estimated Cost
Land Acquisition	$125,000
Free Standing Tower	100,000
Equipment Cost (including Antenna, STL, Studio	

Equipment)	
Three Months' Operating Costs	72,000
Auxiliary Power Equipment	5,000
TOTAL REVISED ESTIMATED COSTS	$422,000

(WEDA Ex. 6, p. 6).

38. The Presiding Judge accepted the March 18, 1991 Amendment to WEDA's application, wherein WEDA amended its financial qualifications showing, including its cost estimates. (Tr. 22-23). *See also, Order*, FCC 91M-1452, released April 25, 1991.

Funds To Meet Estimated Costs

WEDA's Original Funding Proposal

39. To meet its initially estimated $392,000 in costs of construction and operation, WEDA relied upon commitments from both Fritschi and Reardon to provide funds to WEDA.

40. Fritschi testified that after reviewing her personal financial situation with her husband, she determined that she had sufficient net liquid funds and assets available to fund her 15% share of the costs of constructing and operating the Homewood station. (WEDA Ex. 6, p. 3). Her 15% share of $392,000 amounted to approximately $59,000. *Id.*

41. In 1988, Fritschi had available to her at least $108,310 in funds from her Merrill Lynch Cash Management Account (jointly held with her husband) to fund her obligation to WEDA. (Tr. 433; WEDA Ex. 10, p. 1).

42. Fritschi relied upon Reardon to provide up to $392,000 to WEDA, which resulted in a total of $451,000 in funds available to WEDA. (WEDA Ex. 6, pp. 3-4).

43. By letter dated August 12, 1988, Reardon committed to provide WEDA up to $392,000 for the Homewood station. (WEDA Ex. 6, p. 9). To this commitment letter, Reardon had appended a letter dated July 12, 1987 to him from Citibank (South Dakota), N.A. (Citibank), in which Citibank agreed to lend Reardon up to $2.75 million for FM broadcast applications in which he might be an individual applicant, general partner or limited partner. (WEDA Ex. 6, p. 10).[6]

44. Fritschi had previously spoken to Reardon about the amount of funds that she needed from him prior to his writing the August 12, 1988 letter. (WEDA Ex. 6 p. 3). Counsel also had advised Fritschi to ask Reardon to document his ability to fund his portion of the cost of constructing the station, either with a financial statement or some other evidence of his ability to fund his commitment. (WEDA Ex. 6, p. 3). Fritschi requested a letter from Reardon. (WEDA Ex. 6, p. 3; Tr. 384, 515). Reardon agreed to provide her such a letter and notified her that he would be relying upon a financial commitment letter from Citibank. (WEDA Ex. 6, p. 3; Tr. 515). Reardon assured her that sufficient funds were available under that Citibank letter for the exclusive use of WEDA. (WEDA Ex. 6, p. 3).[7]

45. The Citibank letter states the following:

"Dear Mr. Reardon:

"We are willing to lend you up to $2,750,000 provided the following conditions are met:

"1. You are successful in obtaining approval from the Federal Communications Commission to construct and operate various commercial broadcast licenses that you apply for as principal or as a limited or general partner;

"2. All reasonable and ordinary credit criteria of the bank are met at such time as you (a) have received the license to operate said station; and (b) request from the bank a formal lending commitment. Our final lending commitment will contain standard lending requirements, which may include the execution of a formal lending Agreement;

"3. We are provided with readily marketable collateral adequate to secure the loan.

"While the pricing and terms of amortization of any loan commitment will, of course, be contingent upon the exact credit conditions prevailing at the time of such commitment, we estimate that if the loan were made today it would be made at the rate of 2% over the base rate of Citibank, N.A., New York, New York, or presently 10.25%; and, any loan made will be repaid in twenty (20) equal or semi-annual installments or as otherwise reasonable in line with financial projections received prior to the time of borrowing.

"The loan will be collateralized with the assets of the FM radio station (in addition to any other collateral which we may deem necessary to secure the loan). Our loan documents will comply with all requirements of the Federal Communications Commission including the provision of a minimum of ten days prior written notification to you and to the Federal Communications Commission before any equipment will be repossessed under any default clause of the Loan Agreement.

"This bank is personally and favorable acquainted with you. As a condition of our intent to finance these stations, we are depending upon your continued participation in the venture described above.

"Best regards,

"W.A. Kauffman
"Vice President"

(WEDA Ex. 6, pp. 10-11).

46. The issuance of the July 23, 1987 Citibank letter was the product of several months of meetings and conversations between Reardon and officials of Citibank, as well as various correspondence.

47. Both Messrs. Reardon and Kauffman testified that Reardon first telephoned Kauffman sometime in the spring of 1987 to see whether Citibank could provide such a letter to him in connection with the FM applications in

which Reardon might be involved. (Tr. 588, 1049). After this, Reardon met face-to-face with Kauffman to discuss the matter further. (Tr. 588).

48. Kauffman is currently a Vice President, Treasury and Banking Department, Citibank (South Dakota), N.A., Sioux Falls, South Dakota. (Tr. 1047). Kauffman has held that position since the bank was opened in 1981. (Tr. 1048). Kauffman is currently a member of Citibank's Loan Committee. (Tr. 1048). He was a member of the Committee as of July 23, 1987. (Tr. 1048).

49. Messrs. Kauffman and Reardon had known one another since Kauffman's arrival in Sioux Falls in 1981. (Tr. 1074).[8] Although Citibank had not made any loans to Reardon, Kauffman knew of Reardon's reputation in the community. (Tr. 1074).

50. By letter dated May 7, 1987, Reardon formally requested that Citibank issue him a letter in the amount of $2.75 million. (Barber Ex. 9, p. 1; Tr. 517, 588, 1049-1050). To the May 7th Letter, Reardon had appended a draft of the letter that he sought from Citibank (Barber Ex. 9, p. 2; Tr. 1050), as well as his personal financial statement. (Barber Ex. 9, p. 4; Tr. 1050-1051). Kauffman received the letter on May 11, 1987. (Tr. 1050).[9]

51. In his May 7th letter, Reardon estimated that the average cost of constructing a station was $250,000. (Barber Ex. 9, p. 1; Tr. 520, 522). Reardon testified that he discussed on several occasions with Kauffman that some stations might cost less than that amount, some more, and others could be much more. (Tr. 520). Reardon specifically did *not* understand that he could borrow only $250,000 per station. (Tr. 519). Kauffman testified that Citibank did *not* intend to limit how much Reardon could finance per station. (Tr. 1077-1078).

52. Kauffman sent Reardon's May 7th letter to Eugene Rowenhorst, a Vice President of Citibank and Kauffman's supervisor. (Tr. 1051). Rowenhorst was Kauffman's supervisor at Citibank in May 1987. (Tr. 1051-1052). Rowenhorst, too, was then (and is today) a member of Citibank's Loan Committee. (Tr. 1052). Kauffman received Reardon's letter bank from Rowenhorst on May 19, 1987. (Barber Ex. 9, p. 1; Tr. 1052). Reardon testified that he subsequently met with both Messrs. Kauffman and Rowenhorst to discuss further the proposed letter. (Tr. 588).

53. Kauffman also sent the Reardon request letter to Charles D. Gullickson, Citibank's outside counsel. (Tr. 1052).[10] Kauffman consulted Gullickson about whether or not to issue the letter, as well as the language in the letter. (Tr. 1048; 1078). Reardon understood that it was necessary to have counsel review the letter to ascertain Citibank's legal obligations under the letter. (Tr. 590, 592).

54. Kauffman spoke to Reardon on June 19, 1987 about the letter. (Barber Ex. 9, p. 1; Tr. 1052-1053). Citibank did request additional financial information from Reardon (Tr. 590), which he provided in a letter dated June 28, 1987. (WEDA Ex. 11, pp. 1-2). This handwritten letter contained various personal financial information about Reardon for Citibank. (WEDA Ex. 11,pp. 1-2; Tr. 1054). Kauffman received Reardon's second letter on June 29, 1987. (WEDA Ex. 11, p. 1; Tr. 1053). Kauffman forwarded the letter to Rowenhorst for the latter's review. (Tr. 1053). Rowenhorst returned the letter to Kauffman on July 9, 1987. (WEDA Ex. 11, p. 1; Tr. 1053).

55. With the handwritten letter, Reardon enclosed a signed copy of his personal financial statement. (Barber Ex. 9, p. 3). Reardon also documented the assets listed in his June 28th Letter and on the financial statement.

56. Reardon provided Kauffman with the following: (1) a statement of account from Merrill Lynch Pierce Fenner & Smith (WEDA Ex. 12; Tr. 1055); (2) a bank account statement from Western Bank, Sioux Falls (WEDA Ex. 13, Tr. 1055); (3) an FCC Form 323 Ownership Report which disclosed his 50% ownership interest in Radio Station KXLK, Haysville, Kansas (WEDA Ex. 14, p. 2; Tr. 1056); (4) a Fidelity Investments account statement for the Scott Reardon Trust (WEDA Ex. 15; Tr. 1056); and (5) a lease for a real estate partnership which Reardon valued at $109,000. (WEDA Ex. 11, p. 2; WEDA Ex. 16; Tr. 1056) Kauffman received all these materials on or about June 29, 1987. (Tr. 1055-1056).

57. The Merrill Lynch portfolio was valued at $708,645.35 as of the period ending December 31, 1986. (WEDA Ex. 12, p. 1; Tr. 600). He received cash proceeds of $1.5 million from the sale of KXLK in 1988. (Tr. 603).[11] The value of the Scott Reardon Trust as of May 1987 was $330,000. (WEDA Ex. 15, p. 1; Tr. 604).[12]

58. Kauffman included all these documents that he received from Reardon in his credit review file for what eventually became the July 23, 1987 Citibank letter. (Tr. 1056).

59. In all, Reardon testified that over the several months in 1987 which culminated in the July 23rd Letter, he met twice face-to-face with Kauffman about the letter (including one meeting with Rowenhorst on the matter, as well as having as many as seven telephone discussions on the matter. (Tr. 588).

60. Ultimately, Kauffman sent the July 23, 1987 letter under a cover letter dated July 23, 1987,[13] which read in pertinent part:

> "Enclosed is the letter you requested with your letter of May 7, 1987 . . .
>
> "I appreciate your offer . . . to pay our legal expenses and I have requested Chuck Gullickson to bill you directly."

(WEDA Ex. 18, p. 1).[14]

61. The cover letter was the product of significant editorial changes to a draft of the letter, WEDA Ex. 18, p. 2, that had characterized the letter as an "unused loan commitment" and for which Citibank proposed to charge Reardon a commitment fee. (WEDA Ex. 18 p. 2; Tr. 1058-1059).[15] In addition, the Bank's commitments are normally short-term, *i.e.*, normally not longer than one year. (Tr. 1060). A commitment letter for which the Bank would have been paid a commitment fee would have normally had an expiration date of not longer than one year. (Tr. 1083). Kauffman eliminated these provisions from the cover letter as a result of discussions that Kauffman had with Rowenhorst. (Tr. 1059).

62. Normally, Citibank requires a Credit Approval (CA) by the Loan Committee before making a loan commitment. (Tr. 1061). In addition to Messrs. Kauffman and Rowenhorst, the Loan Committee had one other member at the time, Fred Winkler, President of Citibank. (Tr. 1061).

63. Kauffman actually initiated a formal Credit Approval for Reardon. (WEDA Ex. 19). He prepared a formal "Credit Policy Report/Credit Approval" form for Reardon's request. (WEDA Ex. 19, pp. 1-2; Tr. 1063). Kauffman prepared this in anticipation for action by the Loan Committee. (Tr. 1063). Kauffman had already signed off on the Credit Approval. (WEDA Ex. 19, p. 1; Tr. 1063-1064).[16]

64. In anticipation of issuing a loan commitment to Reardon, Kauffman noted on the report that collateral for the loan facility would include (1) assets of the stations and (2) "borrower's personal marketable collateral, at our option." (WEDA Ex. 19, p. 1). Kauffman testified that Citibank was referring to Reardon as the borrower and his collateral. (Tr. 1064).[17]

65. Citibank also ran a "credit check" on Reardon and his wife. (WEDA Ex. 20; Tr. 1065). Kauffman had requested this check as a part of the Citibank credit file for Reardon. (Tr. 1065). It is Citibank's policy to obtain such a credit check for all of its customer lending relationships. (Tr. 1065).

66. However, ultimately Kauffman wrote on the Credit Approval that it was "Not Used." (WEDA Ex. 19, p. 1; Tr. 1064). Messrs. Kauffman and Rowenhorst ultimately decided that there did not have to be a Credit Approval to issue the July 23, 1987 letter to Reardon. (WEDA Ex. 18, p. 5; Tr. 1061, 1064).

67. Citibank decided to treat the July 23, 1987 letter as a "letter of intent" to lend Reardon up to $2.75 million, provided that he met the terms and conditions of the July 23rd letter. (Tr. 1065).

68. Both the July 23rd Letter and Reardon's initial draft of the letter state the following: "As a condition of our intent to finance these stations, we are depending upon your continued participation in the venture described above." (WEDA Ex. 6, pp. 10-11; Barber Ex. 9, p. 2). Kauffman included this language in the July 23rd Letter because Citibank "wanted to be sure that Reardon continued to be involved" with the stations. (Tr. 1068). Kauffman presumed that Reardon would at all times be involved as an owner of any venture financed by Citibank. (Tr. 1069). Citibank had issued the letter based upon Reardon's financial capability, "so we would assume that Mr. Reardon would have a financial interest and an ownership interest at least." (Tr. 1069). There were never any discussions between Citibank and Reardon about his being involved in management of the stations.[18] (Tr. 1069, 1071, 1078-1079, 1080). Kauffman never had any such discussion with Rowenhorst. (Tr. 1071). Citibank "never assumed that Reardon would work full-time for a particular station." (Tr. 1069). Reardon's involvement in station management was never made a condition of Citibank's issuance of the letter. (Tr. 1078-1079).[19]

69. Reardon did not provide budgets to the Bank for any of the stations in which he is a limited partner. (Tr. 521). Nor did Kauffman request them. (Tr. 610, 1077). Nor did Citibank request copies of the applications. (Tr. 609).

70. Reardon did not provide financial statements for the individual general partners. (Tr. 524-525; 528-529). Citibank never requested such financial information. (Tr. 609-610). Kauffman confirmed that he had never requested information about the proposed stations' management. (Tr. 1077).

71. By letter dated June 19, 1991, Kauffman on behalf of Citibank withdrew the July 23rd Letter to Reardon. (Barber Ex. 8, p. 1; Tr. 1066). The letter states the following: "In view of the substantial time elapsed, my letter of July 23, 1987 is no longer in effect." (Barber Ex. 8, p. 2).

72. Kauffman testified that the "main" reason for the withdrawal of the July 23rd Letter was the passage of time. (Tr. 1067).[20] The decision to withdraw the letter was specifically *not* the result of any adverse information about Reardon or his financial position. (Tr. 1067).

WEDA's Current Funding Proposal

73. WEDA continues to rely on a commitment by Reardon to provide up to $392,000 as his portion of WEDA's estimated expenses to construct and operate the station. (WEDA Ex. 6, p. 7; WEDA Ex. 13, pp. 13-14). In addition, Fritschi continues to commit to provide $63,000, *i.e.*, 15% of the estimated $422,000 to construct and operate WEDA's proposed station. WEDA Ex. 6, p. 6). [21]

74. To meet her current commitment to provide $63,000 to WEDA for its construction and operations expenses, as of the hearing date, Fritschi has available in excess of $196,000 in the Merrill Lynch Cash Management Account that she owns with her husband. (WEDA Ex. 8, p. 1; Tr. 430-431). Fritschi's Combined Financial Statement with her husband shows total assets of $1,534,000 and total liabilities of only $5,300. (WEDA Ex. 9, p. 2).

75. To meet his funding commitment of $392,000, Reardon is relying upon the proceeds from the sale of the Illinois 6 RSA nonwireline cellular telephone system. (WEDA Ex. 6, pp. 7, 13-14, 33).

76. Reardon was the President and 100% shareholder of Horizon Communications Corporation (Horizon), which held the authorization for the Illinois 6 RSA cellular telephone system. (WEDA Ex. 6, pp. 13, 21-23). On July 10, 1991, Horizon filed an application with the Commission for assignment of the authorization to Southwestern Bell Mobile Systems, Inc. (Southwestern Bell). (WEDA Ex. 6, p. 15). On September 5, 1991, the Commission granted the application. *See, Public Notice*, Report No. 91-204, released September 12, 1991. (WEDA Ex. 7, p. 2). By letter dated September 30, 1991, Southwestern Bell notified the Commission that it had consummated the assignment of the transaction and assumed control of the Illinois 6 RSA system. (WEDA Ex. 17, p. 2).

77. By letter dated August 23, 1991, Reardon notified Fritschi that he would use the funds from the sale of Horizon to fund his obligations to WEDA. (WEDA Ex. 6, pp. 13-14). By letter dated August 22, 1991, Southwestern Bell confirmed that Reardon would receive in excess of $5 million from the sale of the Illinois 6 RSA system. (WEDA Ex. 6, p. 33). Fritschi relied upon the August 22, 1991 letter from Southwestern Bell when she certified that WEDA would have sufficient funds available from Reardon's proceeds from the sale of his Illinois 6 RSA system. (Tr. 428). Reardon testified that, in fact, he would receive in excess of $10,000,000 *net* of the reimbursement of costs to construct the Illinois 6 system. (Tr. 608).

Standard Comparative Issue
Heidi Damsky

The Applicant

78. Heidi Damsky is an individual applicant for the new FM station at Homewood, Alabama. (Damsky Ex. 1, p. 1).

79. If granted a construction permit for a new FM broadcast station at Homewood, Alabama, Mrs. Damsky will become employed at the proposed station full-time (a minimum of 40 hours per week) as general manager (Tr. 244, 276). In her capacity as general manager, Mrs. Damsky will supervise all aspects of the station's operations, including the overall supervision of the station's sales, programming, engineering and clerical departments, personal direction of the station's relations with the community and with advertisers, the hiring and firing of all personnel, and the establishment of salaries. Additionally, Mrs. Damsky will administer the station's EEO program (Damsky Ex. 1, p. 3).

80. Mrs. Damsky is not presently employed. She is involved with the United Jewish Appeal, a social services organization which is a non-profit fundraising and proactive spokesperson for the state of Israel and the remnant Jewish Communities throughout the world. Mrs. Damsky became the immediate past chairman of the Women's Young Leadership Cabinet of the national United Jewish Appeal as of June, 1991. She served as chairman of the Cabinet from June of 1990 through June of 1991. In her capacity as Chairman and now as immediate past chairman Mrs. Damsky represents the organization to these women and their communities across the United States; represents the women to the national organization; and represents both the women and the organization to the world. Additionally, she speaks in front of various groups, doing TV videos, and interviews. However, if granted a construction permit for a new FM broadcast station at Homewood, Alabama, Mrs. Damsky will terminate any position she may hold with the United Jewish Appeal and/or any employment with which she might become involved, prior to going on the air with the new FM station at Homewood (Damsky Ex. 1, pp. 1-2; Tr. 279).

81. Mrs. Damsky was employed full-time in 1973 as a legal secretary through a temporary agency, and she ran a business in 1975 (Tr. 245).

82. Heidi Damsky has resided within the service area of the proposed station for the past 18 years, and claims enhancement for 18 years of service area residence as follows: Since February of 1978 Mrs. Damsky has resided at 3508 Mill Run Road, Mountain Brook, Alabama, said residence being within the service area of the proposed station; and from 1973-1978 (Tr. 244), she resided at 117 Dexter Avenue, Crestline Village, Mountain Brook, Alabama, such residence also being located within the service area of the proposed station (Tr. 244). If granted a construction permit for a new FM broadcast station at Homewood, Alabama, Mrs. Damsky will continue to reside within the service area of the proposed station (Damsky Ex. 1, p. 1).

83. Since moving to Mountain Brook, Alabama in 1973, Mrs. Damsky has been involved in civic, charitable and youth activities involving service area residents of the proposed Homewood, Alabama FM station. Her civic involvement has included the following: Since 1981 she has been an executive committee member of the Birmingham Jewish Federation, a social welfare fundraising organization and, since 1981 she has been a United Way contributor. Mrs. Damsky is a former member of the Birmingham Humane Society, where she taught an animal care educational program in the school system (1973-1979) (Tr. 241). She is a former member of National Council of Jewish Women, where she taught a special reading program in the low income school area and organized trips to the courthouse for junior high, low income area students to educate them on the Birmingham governmental system (1975-1980) (Tr. 242). She is a former board member of the Jewish Family Services, having worked with the resettlement of Soviet Jews in the Birmingham area (1989-1990) (Tr. 242-243). She is an advocate for Children Can Soar, a fundraising and action organization to teach parents how to care for children while in admitting areas of state run hospitals (1990-present) (Tr. 243). She was president for two years (1988-1989) of her daughters' gymnastics club; a former board member of the PTA (1988-1989); and a member of the fund raising committee for a cancer camp for children (1988-1989) (Tr. 243). Enhancement is claimed for 18 years civic involvement (Damsky Ex. 1, pp. 2-3).

84. Mrs. Damsky claims no enhancement for broadcast experience. (Tr. 247).

Diversification

85. Mrs. Damsky has no other broadcast interests or other media interest of any kind (Damsky Ex. 2, p. 1).

Auxiliary Power

86. Heidi Damsky will install and utilize auxiliary power generating equipment at both her studio and transmitter sites for the purpose of providing continuous service to the community and to the station's service area in the event of power outage or other emergency (Damsky Ex. 4, p. 1).

WEDA, Ltd.

The Applicant

87. WEDA is a State of Alabama limited partnership. (WEDA Ex. 1, p. 1; WEDA Ex. 5, p. 2). WEDA filed its Agreement of Limited Partnership with the Probate Court in Jefferson County, Alabama on August 15, 1988. (WEDA Ex. 5, p. 2; Tr. 434-435).

88. Ouida J. Fritschi is the General Partner of WEDA. (WEDA Ex. 1, p 1; WEDA Ex. 5, p. 2). She has 100% voting control of WEDA, and owns 20% of the WEDA partnership interests. (WEDA Ex. 1, p. 1). She resides at 77 Fair Harbor Road, Homewood, Alabama 35209. (WEDA Ex. 1, p. 1; Tr. 311).

89. B. Scott Reardon, III is the Limited Partner of WEDA. (WEDA Ex. 1, p. 1; WEDA Ex. 5, p. 2). He owns 80% of the WEDA partnership interests. (WEDA Ex. 1, p. 1). He resides at 908 East 35th Street, Sioux Falls, South Dakota 57105. (WEDA Ex. 1, p. 1; Tr. 443).

90. WEDA's Limited Partnership Agreement is dated as of August 16, 1988, (WEDA Ex. 5, p. 2), although Mrs. Fritschi filed it with the Probate Court in Jefferson County, Alabama on August 15, 1988. (WEDA Ex. 5, p. 2; Tr. 434-435).

91. Fritschi and Reardon executed the "First Amendment to Agreement of Limited Partnership of WEDA, Ltd." on January 11, 1989 and January 18, 1989. (WEDA

Ex. 5, p. 25). The later date was well before the last date for amendments as of right in this proceeding, June 7, 1990. *HDO*, *supra*, 6 FCC Rcd at 711 (¶ 15).

92. Section 2.3 of the Agreement prohibits the Limited Partner from having any role in the management of WEDA's radio station. (WEDA Ex. 5, p. 4).

93. Section 4.1(a) of the Agreement specifically provides that the General Partner is exclusively responsible for the management of WEDA's station. (WEDA Ex. 5, p. 4). Further, Section 4.6 of the Agreement explicitly provides that the Limited Partner shall not:

> a. Perform any services to WEDA materially relating to its radio station;
>
> b. Become actively involved in the management or operation of WEDA's radio station;
>
> c. Be an employee of WEDA's radio station;
>
> d. Perform any services as an independent contractor or agent with respect to the WEDA radio station; and
>
> e. Communicate with the General Partner on matters pertaining to the day-to-day operations of the partnership's business, *i.e.*, the radio station.

94. Section 8.1 of the Agreement provides that the General Partner may withdraw or retire from WEDA at her discretion. (WEDA Ex. 5, p. 16). Section 8.4 of the Agreement states that the General Partner cannot be removed, except for cause, and then only upon the finding of an independent arbitrator that she has engaged in malfeasance, criminal conduct or wanton or willful negligence. (WEDA Ex. 5, pp. 16-17). Under Section 8.3 of the Agreement, removal of the General Partner on the basis of "incapacity" requires an adjudication of incompetence by a court of independent jurisdiction. (WEDA Ex. 5, p. 24).

95. Fritschi is responsible for 15% of the costs of prosecution of the application, as well as 15% of the costs of construction and three months operation. (Tr. 312). In turn, Reardon is responsible for 85% of the costs of prosecution, construction and operations. (Tr. 312).

96. Fritschi has used joint funds to meet her 15% share of the costs of prosecution of the application. (Tr. 315, 429). As of the hearing date, she had already contributed between $7,000 and $8,000 towards the expenses of the application, including her initial capital contribution. (Tr. 427). Fritschi has not borrowed any funds from Reardon. (Tr. 315). He has not advanced her any monies for her share of the WEDA expenses. (Tr. 315-316).

97. There is no specific provision in the WEDA Agreement that requires additional capital contributions beyond the initial contributions by the partners. (Tr. 351; WEDA Ex. 5, pp. 1-19). Fritschi has requested capital contributions from Reardon from time to time and he has made them. (Tr. 352, 504, 508). He has never refused a capital call. (Tr. 427, 508, 609). She has communicated capital calls to his office some 10 or 12 times. (Tr. 436-437). It has been Reardon's understanding that if he refuses to make his pro rata capital contribution, he risks dilution of his ownership interest. (Tr. 507, 513).[22] He would consent to admission of a new limited partner, if he chose not to make a capital call. (Tr. 609).

98. The agreement between Fritschi and Reardon to contribute additional funds above and beyond the initial contributions was an oral agreement. (Tr. 355). Reardon committed in writing to contribute additional funds, up to $392,000 to construct and operate the Homewood station. (WEDA Ex. 6, pp. 9, 13-14).

Formation of the Applicant

99. Fritschi first learned about the availability of the Homewood FM station in the summer of 1988 when she received a telephone call from Anita Boles, an assistant to Congressman Ben Erdreich, the local U.S. Representative. (WEDA Ex. 3, p. 1; Tr. 316). Fritschi is acquainted with both Boles and Rep. Erdreich. (WEDA Ex. 3, p. 1).

100. Boles informed Fritschi of an "opportunity" to go into a partnership with Reardon for a radio station in Homewood. (Tr. 316). This was the first that Fritschi had heard of the Homewood FM station and she expressed substantial interest in pursuing the matter. (WEDA Ex. 3, p. 1).

101. Boles told Fritschi that Reardon was a fine, reliable person. (Tr. 317). The source of Boles' knowledge of Reardon was Congressman Erdreich's association with Thomas L. Siebert. (Tr. 317). Boles informed Fritschi that Siebert was Congressman Erdreich's neighbor in Washington, D.C. (Tr. 317). Boles told Fritschi that Siebert had asked the Congressman if he knew anyone who was active in civic affairs in Homewood. (Tr. 318).

102. Reardon testified that he had initially been interested in Homewood as long as 1 1/2 years before the filing of the application. (Tr. 462). He had become interested generally in FM radio as a result of his having owned an FM station in Haysville, Kansas. (Tr. 444).[23] Homewood had been included among the Docket 80-90 allocations. (Tr. 444). He had also talked to Siebert about the Homewood allocation. (Tr. 444).

103. Approximately 9-12 months before the August 1988 filing, Siebert had mentioned to Reardon that his next-door neighbor in Washington was the Homewood-area Congressman. (Tr. 463). Their next conversation about Homewood occurred approximately one or two months later when Reardon inquired whether Siebert had heard from the Congressman. (Tr. 464). Siebert reported that the Congressman was interested in seeing if anybody wanted to pursue the Homewood FM allocation. (Tr. 464).

104. Reardon testified that approximately 3 weeks before the August 1988 deadline, Congressman Erdreich notified Siebert that some people might be interested in the station. (Tr. 465). Reardon first contacted the Congressman's Washington, D.C. office several weeks before the filing deadline. (Tr. 465). In turn, the office referred Reardon to the Birmingham District Office, which provided him two or three names, including Mrs. Fritschi and Adrienne Lee (now a shareholder in Partners). (Tr. 466-467).

105. Reardon had previously discussed the Commission's comparative criteria with Siebert. (Tr. 467). Reardon testified that he was also looking for people who could make decisions fairly because in his position as Limited Partner he would be "totally beholden to the general partner." (Tr. 467-468). He also sought somebody with supervisory and management skills. (Tr.468).

106. The Congressman's District Office described each person's background and noted any civic involvements. (Tr. 469). Reardon then contacted Fritschi and Adrienne Lee. (Tr. 469). He has no specific recollection of calling anyone else. (Tr. 470).

107. Reardon called Lee and outlined the project to her and eventually met with her. (Tr. 470). He thought that they discussed relative ownership percentages and the dollar amounts that would be required to be invested in an application. (Tr. 473). He told Lee that she would have to be prepared to put up probably $15,000 for expenses of prosecuting the application, (Tr. 473), and that she would have to be prepared to put up 15% of construction costs as high as $300,000. (Tr. 473-474). Reardon specifically did *not* tell her that it would be possible to finance her share of the prosecution expenses. (Tr. 474). He gave her Siebert's name as someone to contact about the FCC process. (Tr. 475). He also gave her a business reference to give "her an opportunity to understand how I conduct myself personally and in business." (Tr. 478).

108. Reardon had additional conversations with Lee to clarify matters previously raised. (Tr. 479). However, she never indicated to him that she wanted to proceed. (Tr. 481). Although application costs had been raised as an issue, Lee never said to Reardon that she would not proceed because of the financial commitment. (Tr. 480). Ultimately, Reardon went with Fritschi because she "expressed a higher level of interest." (Tr. 479).

109. Reardon initially telephoned Fritschi after receiving her name from the Congressman's office. (Tr. 318, 481). He called to see if she was interested in pursuing the Homewood station. (Tr. 482). Reardon and Fritschi had a lengthy conversation about the process of filing an FM station application. (Tr. 318). Fritschi testified that they discussed the comparative process, the cost of constructing a station and the length of the FCC process. (Tr. 318-319). Reardon told Fritschi that he was looking for a partner who was a female or minority, but not necessarily both, who was active in civic affairs and had broadcast experience. (Tr. 319). He told her that the application process could endure for several years. (Tr. 319-320).

110. They discussed a cost range of $300,000 to $400,000 to build and operate the radio station. (Tr. 320). Fritschi recalled that they had discussed relative ownership percentages but does not remember if they discussed what ultimately became their 15%/85% ratio for funding the application. (Tr. 320). They also discussed the possibility that the case would settle, including a monetary settlement. (Tr. 334). Fritschi testified that Reardon also advised her that she had to be prepared to lose her entire investment if they did not receive the Homewood construction permit. (Tr. 337).

111. At the end of the conversation, Fritschi advised Reardon that she wanted to set up a meeting with Reardon, her husband and herself. (Tr. 322). The three met sometime in the next several days at the Marriott Courtyard Hotel in Homewood. (Tr. 322, 482). The three met for approximately one hour. (Tr. 323). They revisited the issues that Reardon had previously outlined on the telephone, including the Commission process and what Reardon sought in a partner. (Tr. 322-323, 483). They also discussed ownership percentages. (Tr. 483). To Reardon a 20% ownership interest with responsibility for 15% of the costs was a "minimum." (Tr. 483). He felt that "if someone is going to be running this, they have to have their money on the line as well." (Tr.483-484).

112. At the end of the meeting, Fritschi had not yet decided whether to proceed with the Homewood application. (Tr. 323). She and her husband contacted several people, including Siebert and Stan Karas, to discuss the matter further. (Tr. 322-324). Siebert had provided her with Karas' name. (Trt. 336).

113. Siebert, who had been recommended by Congressman Erdreich (WEDA Ex. 3, p. 1; Tr. 327), spoke highly of Reardon. (Tr. 324). Siebert also reviewed the applica-

tion process with Fritschi. (Tr. 234-235). At that point, there was no indication that he would represent any applicant. (Tr. 325).

114. Reardon checked out Fritschi, too. Reardon did not obtain a resume. He felt, however, that he did "more extensive research on their background by going to the city of license, meeting with them, talking with them." (Tr. 529). He would also talk with bosses and subordinates. (Tr. 529). Although Fritschi had not worked in recent years.

> " . . . she has been involved in campaigning for a position on the City Commission. She has been involved in a number of hotly contested zoning issues in the community. She had the personal reference [from the Congressman's staff].
>
> "I was able to gather information in regard to her husband's engineering firm. Along with that, by virtue of talking with her about the financial matters, I believed I satisfied myself that in terms of how she will conduct her part of the partnership when it came to making those capital contributions."

(Tr. 529-530).

115. Reardon recalled giving Fritschi a form Limited Partnership Agreement (Barber Ex. 6, pp. 1-19), at the Marriott meeting. (Tr. 485). Fritschi could only recall that she had received the form Limited Partnership Agreement, presumably from Reardon, sometime during their initial discussions. (WEDA Ex. 3, p. 1; Tr. 424-425). She then had Gene Sellers, a local attorney, review the draft Agreement and make any needed changes. (Tr. 339, 346). Reardon had not suggested that she have local counsel review it. (Tr. 413).

116. The law firm of Besozzi & Gavin prepared the substance of the draft of the Agreement. (Tr. 460, 487). Reardon acknowledged that the WEDA draft Agreement was similar to those which were used by other limited partnership applicants in which he was a partner. (Tr. 487-488).

117. Fritschi made some of the "markups" on the Draft Agreement. (Tr. 346). She could not recall specific changes but recalls a discussion with Sellers about them and being comfortable with the changes. (Tr. 348). Reardon could not be sure whether, in fact, he saw a "markup" of the Draft Agreement. (Tr. 490-492). In any event, Sellers incorporated the changes. (Tr. 350). After the review by Sellers, Fritschi sent the Agreement to Reardon, who signed and returned it to her. (Tr. 349).

118. Sometime prior to the execution of the Agreement, Fritschi retained Siebert as counsel for the application. (Tr 330). She did not interview any other communications lawyer other than Siebert. (Tr. 331). Reardon never indicated that she must choose Siebert. (Tr. 331). "Mr. Reardon indicated to me that it was totally my call." (Tr. 331).

Preparation of the Application

119. In concert with Siebert's office, Fritschi worked to complete the application and personally drafted the EEO Program and the Program Service Statement for the Application. (WEDA Ex. 3, p. 2; Barber Ex. 7, pp. 11-12, 14-17). She personally contacted the transmitter site owner, negotiated a price for acquiring the site, and obtained his approval for WEDA's plan to designate the property as the transmitter site. (WEDA Ex. 3, p. 2).

120. Fritschi established a separate WEDA Merrill Lynch Money Market Account for the application, for which she is the only authorized signatory, into which she deposits all capital contributions made by Reardon and herself. (WEDA Ex. 3, p. 3). She hired a local CPA to prepare the necessary tax and accounting reports for WEDA. *Id.* Further, Fritschi established the local public inspection file at Sellers' office. *Id.* She also prepared and made arrangements for the local newspaper notices regarding the application. *Id.*

121. Siebert had recommended a consulting engineer, Rusty Irvin. (Tr. 378, 380). He told her that she needed a consulting engineer to complete the application and recommended Irvin (Tr. 379). Siebert also gave Fritschi the name of a broadcast consultant, Stan Karas. (Tr. 336). She called him to discuss generally what was involved in the radio business. (Tr. 336). Siebert had also recommended that she contact Karas about a projection of the costs to construct and operate WEDA's proposed station. (WEDA Ex. 6, p. 1).

122. Under a cover letter dated August 9, 1988, Karas sent her the projections for the cost of constructing the station. (Barber Ex. 11, p. 2; WEDA Ex. 6, p. 1). Karas sent the information directly to Fritschi, with a copy to Siebert. (Barber Ex. 11, p. 2).

123. Fritschi explained to Reardon that she needed a commitment for funding before the application was filed. (Tr. 384; WEDA Ex. 6, p. 4). She also told him that WEDA needed documentation as a basis for the financial qualifications certification. (Tr. 385; WEDA Ex. 6, p. 3). Counsel had informed her that such documentation was necessary. (Tr. 385; WEDA Ex. 6, p. 3).

124. Reardon's arrangements with Citibank had been made in 1987 without any input from Fritschi. (Tr. 316; WEDA Ex. 6, pp. 10-11).[24] She never discussed the letter with any representative of Citibank. (Tr. 316).

125. Fritschi understood the letter to be an upper limit on Reardon's arrangements with Citibank. (Tr. 387-388, 400). She did not discuss with Reardon the other obligations that he might have covered with the Citibank letter. (Tr. 387). From Reardon's August 12, 1988 letter, she understood that he had committed $392,000 to WEDA based upon the Citibank letter. (Tr. 388; WEDA Ex. 6, p. 9).[25]

126. WEDA's application was complete when Fritschi reviewed it for signature. (Tr. 358-359). She reviewed its contents prior to signing. (Tr. 359).

Integration Proposal

127. WEDA seeks 100% quantitative integration credit on the basis of Fritschi's proposed full-time integration into management of the proposed Homewood station. (WEDA Ex. 3, p. 3). Fritschi will work full-time, a minimum of 40 hours per week, as General Manager of the proposed Homewood station. (WEDA Ex. 3, p. 3).

128. Fritschi is not currently employed. (WEDA Ex. 3, p. 3; Tr. 313). However, in the event that she were to become employed, Fritschi has committed to resign any such employment when the grant of WEDA's application has become "final" as defined by the Rules and Regulations of the FCC. (WEDA Ex. 3, pp. 3-4).

129. As General Manager of the Proposed FM station, Fritschi will have the primary and ultimate responsibility of all decisions affecting the Homewood station's day-to-day and long-range operations. (WEDA Ex. 3, p. 4). She will have authority for the hiring and firing of all station personnel. *Id.* She will specifically have ultimate authority for all matters involving station sales and programming. *Id.* As General Manager, she will also be the person at the station responsible for implementation and oversight of the station's Equal Employment Opportunity Program. *Id.*

130. Fritschi was last employed on a full-time basis in 1980. (Tr. 313). From 1979 until 1980, she was a medical psychologist with the University of Alabama/Birmingham. (Tr. 313). For 2 1/2 years, from 1981 to 1983, Fritschi held a part-time teaching assistantship at the University of Alabama at Tuscaloosa. (Tr. 313-314). She taught two courses a term. (Tr. 314). From 1983 until 1985, Fritschi had an internship at the Office of Educational Development with the University of Alabama School of Medicine. (Tr. 313-314). Fritschi has completed all the degree requirements for a Ph.D. in Educational Psychology, except for her dissertation. (Tr. 431).

131. Fritschi has lived in Homewood, the community of license, for more than 22 years. (WEDA Ex. 3, p. 4). Fritschi moved to her current address, 77 Fair Harbor Road, Homewood, on February 23, 1991. (WEDA Ex. 3, p. 4). From 1979 until February 23, 1991, she resided at 300 Lakeshore Drive, Homewood. *Id.* From 1970 until 1979 she resided at 1032 Saulter Road, Homewood. *Id.* From 1969 until 1970 she resided at 1903-D Lancaster Road, Homewood. *Id.*

132. Since 1976, Fritschi has been a member and volunteer in the Edgewood Parent Teacher Organization (PTO), the Homewood Middle School PTO and Sports Association and the Homewood High School PTO, Sports Association and Band. (WEDA Ex. 3, p. 5).

133. During 1980, Fritschi was the Office Manager for Buchanan for Congress, 6th Congressional District. Then Rep. Buchanan was the incumbent Republican Congressman. (WEDA Ex. 3, p. 5). From 1980 until 1982, she was a member of the Saturday Morning Breakfast Club. This was an offshoot of her work on the Buchanan campaign. The Club was a non-partisan group that met for breakfast once per month and heard political figures discuss issues of interest to Homewood and the surrounding area. (WEDA Ex. 3, p. 5).

134. From 1981 until 1984 Fritschi was the Treasurer for Jefferson County South South National Organization for Women (NOW). (WEDA Ex. 3, p. 5). During 1982, Fritschi was the Campaign Manager for White for Senate, a candidate for the State Senate for Alabama's 16th District, which includes southern Jefferson County. (WEDA Ex. 3, p. 5). From 1982 until 1984, Fritschi was the Secretary of the Alabama National Organization for Women. (WEDA Ex. 3, p. 5).

135. During 1983, Fritschi was a Board Member of Homewood Citizens Association. (WEDA Ex. 3, p. 5). In 1984, Fritschi was a Volunteer Coordinator for the Mondale/Ferraro Campaign in Jefferson County, Alabama. Homewood is located in Jefferson County. (WEDA Ex. 3, p. 6). Since 1984, Fritschi has been a Volunteer for Commodity Distribution in Homewood through the Jefferson County Committee for Economic Opportunity. (WEDA Ex. 3, p. 6). During 1984, Fritschi was a board member of the Homewood Citizens Association. (WEDA Ex. 3, p. 6).

136. In 1985, she was a member of the Advisory Task Force for Alabama State Social Studies Curriculum. Fritschi was also the Vice President of the Homewood Citizens Association in 1985. (WEDA Ex. 3, p. 6). From 1985 until 1987, Fritschi served as President of the Jefferson County/South Chapter of National Organization for Women. (WEDA Ex. 3, p. 6). From 1986 until 1988, Fritschi was the President/Newsletter Editor of the Homewood Citizens Association. In addition, she served on the Board of the Homewood Citizens Association in 1988. (WEDA Ex. 3, p. 6). Since 1986, Fritschi has worked with many civic groups, such as The Rosedale Community (located in Homewood), and the Homewood Merchants and Business Association when they needed assistance making a presentation to the Homewood Planning Commission and/or the Homewood City Council. In addition, Fritschi has also worked with the Superintendent of the Homewood Board of Education. (WEDA Ex. 3, p. 6).

137. During 1988, Fritschi was a Founding Member of the "We Love Homewood Day" Committee, and a Candidate for Homewood City Council. The "We Love Homewood Day" Committee organizes various events and activities to recognize and increase community spirit and identity in Homewood, including a 10K road race and a performance by the Homewood School of Ballet. (WEDA Ex. 3, 7).

138. In 1989, Fritschi served on the Board of the "We Love Homewood Day" Committee. (WEDA Ex. 3, p. 7). Since 1989, Fritschi has been a member of the Transportation Citizens Committee, representing Homewood, which operates through the Birmingham Regional Planning Commission. Since 1989 she has been a Board Member, the Corresponding Secretary and Newsletter Editor of the Homewood Citizens Association. Fritschi has also been a member of the Southern Area Democratic Club since 1989, which covers Homewood. (WEDA Ex. 3, p. 7).

139. In 1990, Fritschi served as the Vice President of the "We Love Homewood Day" Committee. (WEDA Ex. 3, p. 7). Since 1990 Fritschi has been a member of the Parent Advisory Board for the Homewood School of Ballet. (WEDA Ex. 3, p. 7).

140. WEDA has not claimed credit for broadcast experience.

Diversification

141. Neither WEDA nor Fritschi have any ownership interest in any medium of mass communications, including any radio or television station, cable television system, newspaper or magazine of general circulation, Multipoint Distribution Service system station or Multi-Channel Multipoint Distribution Service system station. (WEDA Ex. 2, p. 1).

142. Reardon has no attributable interest in any medium of mass communications. (WEDA Ex. 2, p. 1). Reardon currently owns 80% of the total partnership interests of Greater Greenwood Broadcasting Limited Partnership (Greater Greenwood), construction permittee of a new FM station at Greenwood, Indiana. In his *Initial Decision* in *Sanders Broadcasting Company Limited Partnership*, 5 FCC Rcd 5671 (Admin. L. J. 1990), the Presiding Judge concluded that Reardon's interest in Greater Greenwood was not an attributable one. 5 FCC Rcd at 5678 (¶¶ 104, 106). The *Initial Decision* became final when the competing applicant did not appeal the outcome.

143. As of the hearing in this proceeding, Reardon had the following non-attributable limited partnership interests in the following pending applications:

Applicant Name	File Number	Community	% Size
Hope Valley FM Limited Partnership	BPH-870910MC	Paradise Valley, AZ	80%
JAM FM Limited Partnership	BPH-871110NL	Sacramento, CA	80%
JH Broadcast Limited Partnership[26]	BPH-871203NF	Eden Prairie, MN	75%
Prairie Rose Broadcasting Limited Partnership[27]	BPH-880421NQ	Olathe, KS	80%
Pederson Limited Communications Partnership	BPH-870908MS	Germantown, TN	80%

Reardon has no other interests in any pending broadcast application.

Auxiliary Power

144. WEDA will install auxiliary power facilities at both WEDA's studio and transmitter sites. (WEDA Ex. 4, p. 1).

Homewood Partners, Inc.

The Applicant

145. Homewood Partners, Inc. (HPI) is the successor in interest to Willie Huff, Deborah Huff and Adrienne F. Lee, a Partnership d/b/a Homewood Partners (Partners) (Homewood Partners Ex. 1, p. 1). Willie Huff and Deborah Huff are husband and wife (Homewood Partners Ex. 2, p. 3, Homewood Partners Ex. 3, p. 1).

Formation of the Applicant

146. Lee initiated Partners formation. She was initially approached by others, including Reardon, to serve as a general partner in a limited partnership applicant (Homewood Partners Ex. 4, p. 1; Tr. 869-870). Lee sought the advice of her local counsel, Marvin Stewart, after receiving these calls (Homewood Partners Ex. 4, p. 1; Tr. 871, 873). She has known Stewart since approximately 1980 (Tr. 871). Stewart told Lee that he knew some people that might be interested in pursuing the matter with her (Homewood Partners Ex. 4, p. 1; Tr. 874).

147. Stewart told Willie Huff of the opportunity (640-641, 644). Stewart and Huff belong to the same church (Tr. 640-641). Stewart has also performed legal work for Huff (Tr. 637). Huff indicated to Stewart a desire to discuss the matter further (Tr. 641-642).

148. Stewart then arranged a meeting between Huff and Lee (Tr. 875, 642). Huff and Lee did not know each other personally at this time, though each knew of the other (Tr. 872, 643). Huff, Lee and Stewart met at Stewart's law office (Tr. 874, 875, 642). They discussed the opportunity, how Lee came to learn of it, and whether it was something worth pursuing (Tr. 642-643, 876). A decision to form a partnership to pursue the application was made after Huff discussed the matter with his wife (Homewood Partners Ex. 4, p. 1; Tr. 645).

149. Partners was formed pursuant to a partnership agreement entered into on August 15, 1988 between Willie Huff, Deborah Huff and Adrienne F. Lee (Homewood Partners Ex. 1, p. 1). Each had a one third interest in the partnership (Homewood Partners Ex. 1, pp. 1, 3-6).

150. HPI, the successor to Homewood Partners, was incorporated in February 1991. HPI consists of Willie Huff, Deborah Huff and Adrienne F. Lee as the voting shareholders and Franklin Hopkins and W. James Ellison as non-voting shareholders. Each of the voting shareholders holds 400 shares of class A common stock and a 1/3 interest in the control of the corporation. The class A common stock is the only stock of the company that is entitled to vote. Each of the non-voting shareholders owns 600 shares of class B common stock. Each of the stockholders holds a 20% equity interest in HPI by virtue of his/her stock ownership. (Homewood Partners Exs. 1, 8).

151. The rights, duties, and obligations of the shareholders are defined and controlled by: an Agreement to Form Corporation entered into on February 22, 1991 (Homewood Partners Ex. 1, pp. 7-15), as amended (Homewood Partners Ex. 8, pp. 1-4); the Articles of Incorporation of Homewood Partners, Inc. A Body Corporate, executed on February 22, 1991 by Willie Huff, Deborah Huff and Adrienne F. Lee as incorporators and filed with the State of Alabama on March 1, 1991 (Homewood Partners Ex. 1, pp. 16-24), as amended (Homewood Partners Ex. 8, pp. 5-7); and By-Laws of Homewood Partners, Inc. A Body Corporate, executed by each of the shareholders on February 22, 1991 (Homewood Partners Ex. 1, pp. 25-33), as amended (Homewood Partners Ex. 8, p. 8). All control is vested with the holders of class A voting stock (Homewood Partners Ex. 1, pp. 9, 20, 27-30, Homewood Partners Ex. 8, pp. 1-8).

152. Hopkins, a staff manager at the telephone company where Mr. Huff works, has known Mr. Huff since 1980 (Tr. 967, 977).[28] Ellison has been a professor of law at Sanford University in Birmingham, Alabama since 1984 (Tr. 1000). Ellison also was an associate with Najer & Danenberg in 1988 (Tr. 1001-1003). He has known Mr. Huff since prior to 1988. (Tr. 1004).

153. Hopkins and Ellison made loans to Partners in 1988, at the behest of Mr. Huff. However, neither acquired an ownership interest in Partners (Homewood Partners Ex. 1, p. 1). Further, neither Hopkins or Ellison have ever been involved in partnership affairs or performed any services for the partnership (Tr. 997-998, 1034).

154. Hopkins recalled a conversation with Mr. Huff in August 1988 wherein Huff asked him for a loan of $1200 which he agreed to (Tr. 987). Huff asked him to make the check to Partners but Huff guaranteed that he would pay the money back (Tr 989, 976). Hopkins did not charge him interest on the loan because Huff is a good friend and he doesn't charge interest to friends. (Tr. 987).

155. In the course of his discussion with Huff, Huff told him about the Partners having applied for a construction permit in the Birmingham area. Tr. 987. Hopkins expressed an interest in participating in the venture. (Tr. 987). Huff made clear, however, that under the partnership structure that existed, Hopkins could not be part of the applicant. Huff told him that if they later decided to change the makeup of the entity, a decision would then be made as to whether he should be included. However, there was no discussion at that time about forming a corporation at some point in the future. (Tr. 987).

156. The August 28, 1988 check contains the notation "Ownership of 20% of Homewood Partners." (Damsky Ex. 5, p. 3). Hopkins made the notation to reflect that he would like to be considered for a 20% interest if a reorganization occurred. (Tr. 989). Hopkins did not consider the check to be a receipt for his purchase of a 20% ownership interest in Homewood Partners. Hopkins reiterated that the check constituted a loan (Tr. 994) and he received nothing in return for the loan other than Huff's promise of repayment (Tr. 988-989, 991, 994).

157. On August 31, 1988, Ellison also wrote a check for $1200 made out to Homewood Partners. The check represented a loan (Tr. 1003). Ellison's understanding was that his status was the same as Hopkins, namely, both were interested but neither he or Hopkins was a participant in the applicant. It was Ellison's understanding that they could loan money to the partnership and if the partners agreed at some point in time, they might be brought in. However, there was no guarantee made to him that this would happen (Tr. 1014, 1032). Ellison's check contains the notation "20% interest Radio." Ellison explained that he made the notation to indicate the amount of exposure he was prepared to accept if he was brought in (Tr. 1014-1015).

158. Huff maintained an account ledger for Homewood Partners beginning August 15, 1988. The handwritten entries made by Huff contemporaneous with the transaction shows that the money received from Hopkins and Ellison were treated as loans. (Homewood Partners Ex. 9, p. 1; Tr. 775-779, 785-786).[29]

Integration Proposal

159. Willie Huff will be the general manager of HPI's proposed station (Homewood Partners Ex. 2, p. 2). He will work no less than 40 hours per week as general manager of the station (Homewood Partners Ex. 2, p. 2). As general manager, Huff will personally oversee all areas of station operation (Homewood Partners Ex. 2, p. 2). He will also establish station policy along with Ms. Huff and Ms. Lee (Homewood Partners Ex. 3, p. 1-2, Ex. 4, p. 2).

160. Huff has a wide degree of business experience, including employee supervision (Homewood Partners Ex. 2, pp. 1-2). In addition to holding a college degree, Huff holds a Masters in Business Administration. Huff is currently employed at BellSouth Services in Birmingham. In order to fulfill his full-time commitment to the proposed radio station, he will resign his employment position at BellSouth Services, and any other employment he may have, at or prior to program test authority of the proposed station (Homewood Partners Ex. 2, p. 2).

161. Huff has community and civic involvement in the following activities, each of which took place within the service area of the proposed station:

- Chairman, Minority Business Council, Birmingham Area Chamber of Commerce, December 1, 1987 to November 31, 1988 (Member, 1986 to 1989).

- Member, Big Brothers of Birmingham, 1982 to Present

- Member, Omega Psi Phi Fraternity, Birmingham, 1977 to Present

- President, Ensley Highlands Neighborhood Association, Birmingham, July 1989 to Present

- Founder, Midnight Basketball League, Birmingham, January 1991 to Present

- Chairman, Jobs Committee of Operation Total Involvement, June 1990

- Member, Board of Directors, EPIC School, August 1990 to Present

Additionally, while in Atlanta, Huff was the Director, Eastside Boys' Club Volunteer Program, from 1971 to 1973 (Homewood Partners Ex. 2, p. 3-4).

162. To the extent that Mr. Huff's positions of civic involvement or responsibility listed above require a time commitment of more than eight hours per week in the aggregate at the time of program test authority, Huff will resign from or curtail his activities with selected organizations so that his time commitment is no more than eight hours per week total for all other activities (Homewood Partners Ex. 2, p. 2).

163. Huff is a African-American (Homewood Partners Ex. 2, p. 2).

164. Huff will, upon or prior to a grant of program test authority for the proposed station, move to Homewood, Alabama and establish a permanent residence in Homewood. He presently resides in the service area of the proposed station and has done so since April of 1977 as follows: He has resided at 2200 26th Street, West, Birmingham, Alabama since October, 1980. From December, 1978 to October, 1980, he resided at 1034 Henry Drive, Alabaster, Alabama. From April, 1977 to December, 1978, he resided at 226 Robert Jemison Road, Apartment 1A, Birmingham, Alabama. Birmingham, Alabama and Homewood, Alabama are contiguous communities (Joint Ex. 1, Figure 1). Prior to May, 1977, Mr. Huff resided in Atlanta, Georgia (Homewood Partners Ex. 2, pp. 2-3).

165. Mr. and Mrs. Huff have three children, ages ten, seven and two. They currently utilize the services of a day care provider for their children, thus enabling them to attend to their jobs. They will continue to do so in the event HPI's application is granted (Homewood Partners Ex. 2, p. 3, Homewood Partners Ex. 3, p. 1).

166. *Deborah Huff* will serve as program director for HPI's station (Homewood Partners Ex. 3, p. 1). She will work not less than 40 hours per week in this position (Homewood Partners Ex. 3, p. 1). As program director, Ms. Huff will supervise each of the announcers and the news director of the proposed station as well as participate in general and day-to-day policy decisions with Mr. Huff and Ms. Lee (Homewood Partners Ex. 3, p. 1-2).

167. Ms. Huff has been employed continuously since her graduation from Morris Brown College in 1976 (Homewood Partners Ex. 3, p. 1-2). In 1977, Ms. Huff obtained employment with the South Central Bell Telephone Company in Birmingham, Alabama and relocated to that city. Ms. Huff has been with the South Central Bell

Telephone Co., or a subsidiary or successor in interest since that time. Ms. Huff has held the position of assistant staff manager, assistant supervisor, and staff manager. She is currently a staff manager, pay grade four, in the network planning department (Homewood Partners Ex. 3, p. 1). Upon a grant of program test authority for the proposed station, Ms. Huff will resign her position at South Central Bell Telephone Inc., and any other employment she may have, in order to fulfill her commitment to work at the proposed radio station. (Homewood Partners Ex. 3, p. 2).

168. Ms. Huff has community and civic involvement in the following activities, each of which took place within the service area of the proposed station:

- Member, Bon Ami Social Club, Birmingham, 1983 to Present
- Alpha Kappa Alpha Sorority, Inc. Omicron Omego Chapter, Birmingham, 1989 to Present
- Sardis Baptist Church - Couples Sunday School Class, Nursery Worker, Birmingham, 1981 to Present (Sunday Coordinator for Nursery, 1984 to Present)
- Cahaba Girl Scout Council, Coordinator for Brownie Troop No. 351 at EPIC School, Cookie Chairman, 1990 to Present
- Board Member, Sculpturessence Foundation for Arts, Inc., 1991 to Present
- Member, Telephone Company Future Pioneers, Birmingham
- Member, Discovery Place Children's Museum Guild, Birmingham, September 1987 to September, 1989
- Member, Metropolitan Civitan Club, Birmingham, 1984 to 1986; Board Member 1985-1986
- Member (Contributor), WBHM-FM Public Radio, Birmingham

(Homewood Partners Ex. 3, p. 2-3). To the extent that Ms. Huff's positions of civic involvement or responsibility require a time commitment of more than eight hours per week in the aggregate at the time of program test authority, Ms. Huff will resign from or curtail her activities with selected organizations so that her time commitment is no more than eight hours per week total for all other activities (Homewood Partners Ex. 3, p. 2).

169. Deborah Huff is an African-American (Homewood Partners Ex. 3, p. 3).

170. Deborah Huff resides in the service area of the proposed station and has done so since 1977 as follows: She has resided at 2200 26th Street, West, Birmingham, Alabama since October, 1980. From December, 1978 to October, 1980, Ms. Huff resided at 1034 Henry Drive, Alabaster, Alabama. From August 1977 to December 1978, she resided at, 226 Robert Jemison Road, Apartment 1A, Birmingham, Alabama (Homewood Partners Ex. 3, p. 2). Birmingham, Alabama and Homewood, Alabama are contiguous communities (Joint Ex. 1, Figure 1). She will move to the community of license along with her husband in the event HPI's application is granted (Tr. 723).

171. *Adrienne Lee* will work full-time, no less than 40 hours per week on five or more days of each week as sales manager of the proposed station. As sales manager, Lee will oversee all areas of sales including supervision of each sales person, and participate in general and day-to-day policy decisions with Mr. and Mrs. Huff (Homewood Partners Ex. 4, p. 2). Lee has been involved in sales since 1973 (Homewood Partners Ex. 4, pp. 1-2). She also has prior experience in forming and operating a new business venture. She started her own real estate agency, Avenue of Homes, Inc., in 1979, which she continues to operate today (Homewood Partners Ex. 4, p. 2). Lee is the majority shareholder of that company, as well as an officer and director (Homewood Partners Ex. 4, 2).

172. Upon a grant of program test authority for the proposed station, Lee will turn over all responsibility in her real estate firm to her oldest daughter, Ari, along with her ownership. She will resign as an officer and director, and will not have any further responsibility as a real estate broker or as a partial owner of the brokerage company so that she may fulfill her full-time commitment to the radio station (Homewood Partners Ex. 4, p. 2; Tr. 863-864, 866). Lee's daughter Ari owns the remaining stock in Avenue of Homes, Inc. and is vice president and a director (Homewood Partners Ex. 4, p. 2). Lee has discussed her plans to turn over the business with her daughter (Tr. 867).

173. Lee has been a life long resident of the service area and a long time resident of Homewood as follows: Lee was born in Birmingham, Alabama on February 10, 1933. She resided in the Birmingham area throughout her youth, specifically in Smithfield and Enon Ridge, attending and graduating from Holy Family High School in 1951. Lee subsequently attended Xavier University in New Orleans, Louisiana for a year and a half. At that time she discontinued her education and moved back to Birmingham. Lee subsequently attended Miles College in Birmingham, and graduated in 1961 with a B.A. in biology. She has resided at 1625 South 26th Avenue, Homewood, Alabama since 1955 (Homewood Partners Ex. 4, p. 2-3). Birmingham, Alabama and Homewood, Alabama are contiguous communities (Joint Ex. 1, Figure 1).

174. Lee has community and civic involvement in the following activities, each of which took place within the community of license or within the service area of the proposed station:

- Council Member, Homewood City Council, 1984 to Present
- Advisory Board Member, Rosedale Community Development Corporation, Homewood, 1981 to Present (President, 1981)
- Board Member, Greater Birmingham Habitat for Humanity, 1987 to Present (Vice President, 1987-1988)
- Member, Leadership Birmingham, 1990
- Member, Association of Realtors, Birmingham, 1983 to Present
- Board Member/Economic Development Administration Revolving Loan Fund Board, Birmingham, 1988 to Present
- Board Member, Episcopal Housing Foundation, Birmingham, 1983 to Present
- Rosedale Community (Homewood) Humanitarian Award, 1986

- Chairman, Fundraising Drive, Birmingham NAACP, 1987

- Executive Leadership, NAACP Community Development, 1987

- Women of Distinction Award, Iota Phi Lambda Sorority, Birmingham, 1988

- Member, St. Marks Episcopal Church, approximately 1955 to Present

(Homewood Partners Ex. 4, pp. 3-4).

175. To the extent that Lee's positions of civic involvement or responsibility listed above require a time commitment of more than eight hours per week in the aggregate at the time of program test authority, Lee will resign from or curtail her activities with selected organizations so that her time commitment is no more than eight hours per week total for all other activities (Homewood Partners Ex. 4, pp. 2-3).

176. Lee is an Afrian American. (Homewood Partners Ex. 4, p. 4).

Diversification

177. Neither HPI, nor any of its shareholders (nor its predecessor in interest nor any of its partners) has any ownership interest or positional interest in any medium of mass communication, including any broadcast radio or television station, cable television system, or newspaper, other than the present application for a construction permit for a new FM radio station at Homewood, Alabama (Homewood Partners Ex. 5, p. 1).

Auxiliary Power

178. HPI will maintain auxiliary power facilities at the transmitter site and studio site to maintain service in the event of an interruption of electrical service (Homewood Partners Ex. 7, p. 1).

Comparative Coverage

179. The parties stipulated to the admission of a joint engineering exhibit for the purpose of determining whether any applicant would be entitled to a comparative coverage advantage. The area proposed to be served by each applicant in this proceeding is well served by in excess of five primary, fulltime aural services. Joint Ex. 1. The applicants propose to serve the following areas and populations:

Applicant	Area (sq. km)	Population (1990 Census)
Heidi Damsky	1,800	595,300
HPI	1,690	576,700
WEDA, Ltd.	1,690	550,500

Joint Ex. 1. Ms. Damsky has a 6 1/2% coverage advantage and a 3% population advantage over HPI and an 8% population advantage over WEDA. HPI has a 5% population advantage over WEDA. WEDA has a 1% coverage advantage over Damsky and a 8% coverage advantage over HPI. Joint Ex. 1.

CONCLUSIONS
Qualification Issue
Heidi Damsky
Financial Issue

180. Both the burden of proceeding and proof on the designated financial issue were placed on Damsky. *See Order, supra*, FCC 91M-2780. The record establishes that Damsky failed to satisfy either burden. Thus, Damsky failed at hearing to demonstrate that prior to certifying her application, she had duly ascertained the actual costs of constructing and operating the station for three months. Also, she failed to demonstrate that funds were reasonably available to meet these costs. The issue is resolved adversely to Damsky.

181. It is well settled that in order to demonstrate that projected costs were meaningfully ascertained, "the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction operation costs." *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-5519 (1989). Damsky provided no probative evidence that prior to certification she had engaged in serious and reasonable efforts to ascertain costs. Damsky's ascertainment efforts consisted solely of an oral "ballpark" cost figure of approximately $300,000 provided by Benns, her consulting engineer. Benns did not break down this figure between construction costs and operating costs and did not itemize what was included in this cost figure. Ms. Damsky has no knowledge of what is contained within the $300,000 cost figure or how Benns' "ballpark" figure was derived. In this connection, among other things, Ms. Damsky did not discuss with Benns and had no knowledge of the specific items of equipment needed and the cost of such equipment; whether the transmitter site would be leased or purchased; and the operating expenses of the station for the first three months including the number of employees and their salaries. Damsky's failure to prove that her projected costs were meaningfully ascertained is, standing alone, grounds for denial of Damsky's application. *Victorson Group, Inc.*, 6 FCC Rcd 1697, 1700 and cases cited therein (Rev. Bd. 1991).

182. Additionally, Damsky's failure to adduce proof of sufficient "net liquid assets" at the time she certified her application further compels the conclusion that Damsky is financially unqualified. *Victorson, supra*, 6 FCC Rcd at 1701. Ms. Damsky's determination that she had sufficient financial resources was based solely on a casual conversation with her husband in which she asked if they had enough money. Ms. Damsky did not review her husband's financial statement prior to her certification, nor did she discuss with him the information contained in that statement. An applicant proposing to rely on net liquid assets cannot have reasonable assurance if it has not ascertained that sufficient financial resources existed at the time of certification. *See Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991). Further, despite Ms. Damsky's professed reliance on her and her husband's personal assets, the record makes clear that Mr. Damsky, who manages the family finances, clearly intended to obtain a loan to fund the project. He did not view his wife's question in terms of liquid or non-liquid assets and did not intend, in August 1988, to liquidate their assets and hand the proceeds over to Ms. Damsky for this project. *See* Tr. 1112. Since Mr. Damsky had no intent to liquidate the family's assets and no assurance of bank financing (*See* Tr. 1117), Ms.

Damsky was not financially qualified to construct and operate the proposed station at the time of her certification.

183. Finally, Damsky has failed to show that Mr. Damsky's June 1 1988 financial statement contains liquid assets sufficient to cover the purported $300,000 cost figure. In this regard, the $103,000 claimed for stocks and bonds cannot be credited in the absence of documents identifying these securities and providing evidence of their marketability. Similarly, Damsky offered no proof substantiating the availability of $140,000 from "retained earnings" and Mr. Damsky's ability to draw on them. Mr. Damsky's self-serving testimony is not sufficient. Additionally, Damsky did not submit appraisals demonstrating the value and potential liquidity of the listed real estate, nonmarketable securities and other non-liquid assets and these assets cannot be credited. Also, not reflected in Mr. Damsky's financial statement, he has supplied his personal guarantee to back Damsky Paper Co.'s $1,500,000 line of credit, of which $700,000 to $1,000,000 had been drawn down in 1988. No evidence was submitted by Damsky permitting a determination whether the outstanding line of credit would affect Mr. Damsky's use of his assets to finance the proposed station. For all of these reasons, Damsky was financially unqualified at the time of certification.[30] It is, therefore, unnecessary to reach the more subjective question of whether Ms. Damsky knowingly intended to deceive the Commission when she certified she was financially qualified. *Aspen FM, Inc.*, 5 FCC Rcd 3196, 3199 (Rev. Bd. 1990); *Janice Faye Surber*, 5 FCC Rcd 6155, 6159 (Rev. Bd. 1990).

WEDA, Ltd.
Financial Qualifications

184. WEDA has demonstrated that its projected costs were meaningfully ascertained and has adduced proof of committed sources of funds to meet its projected costs. WEDA is financially qualified.

185. In 1988, WEDA estimated total construction and operation costs of $392,000. No question has been raised about the reliability of WEDA's construction and operations cost estimate. To meet its projected costs, WEDA relied upon commitments from Fritschi and Reardon. WEDA produced documentary evidence of the ability of Fritschi to provide 15% of the total cost, or approximately $59,000. WEDA also established the availability of at least $392,000[31] to Reardon from his proposed line of credit with Citibank (South Dakota), N.A., pursuant to a letter dated July 23, 1987, whereby Citibank proposed to lend Reardon up to $3.75 million for applications in which he might be a partner or individual applicant.

186. The July 23 letter contains all the terms necessary to establish reasonable assurance including the conditions under which the loan would be extended, the amount, the interest rate and collateral. The record reflects further that the issuance of the July 23 letter was the product of several months of meetings and conversations between Reardon and Citibank officials; that prior to its issuance, Reardon provided the bank with his financial statement and other documents documenting the assets listed in his financial statement; that Citibank ran a credit check on Reardon and his wife; and that Reardon's request was reviewed by two of the three members of the Bank's loan committee. WEDA has fully satisfied the criteria enuniciated in *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158 (Rev. Bd. 1990). WEDA has demonstrated it had "reasonable assurance" of a committed source of funds from Citibank at the time of certification.

187. WEDA also demonstrated it is also currently financially qualified. WEDA continues to rely on funds provided by Fritschi and Reardon. Fritschi has available in excess of $196,000 to fund a commitment of approximately $63,000. Reardon now relies, in lieu of the Citibank line of credit, on funds in excess of 5 to 10 million dollars obtained from the sale of the Illinois 6 RSA cellular telephone system to Southwestern Bell Mobile Systems, Inc. It is concluded that Reardon has sufficient funds to meet his commitment to WEDA. WEDA is financially qualified.

Comparative Issue
Diversification

188. None of the three applicants have attributable media interests.[32] None suffer diversification demerits.

Integration - Quantitative

189. The three applicants all receive 100% quantitative integration credit. Heidi Damsky, Ouida J. Fritschi and the three general partners of HPI, Willie Huff, Deborah Huff and Adrienne F. Lee, have all unequivocally pledged to work at least 40 hours a week. Each will perform meaningful management and policy functions at the station and will hold management positions recognized by the Commission as exercising policy functions. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). Furthermore, each has made specific commitments to terminate other employment and reduce outside activities to permit fulfillment of their commitments to the station. No evidence has been offered undercutting their entitlement to full-time credit.

190. WEDA and HPI attack Damsky's integration proposal, claiming that she cannot be credited because she did not play a sufficiently active role in connection with the prosecution of her application. Both opponents ignore the fact that Damsky is an individual applicant, not a two-tiered applicant. Thus, *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), cited by HPI for the proposition that Damsky's integration proposal cannot be credited is inapposite. Also, there is no evidence in the record indicating that anyone other than Ms. Damsky has an ownership interest in the applicant or will be in a position to control the operation of the station. Further, Damsky's opponents have cited no case where integration credit has been denied to an individual applicant where the applicant failed to personally perform all of the tasks associated with the preparation and prosecution of her application and delegated those tasks to her lawyer and consulting engineer. On the contrary, the Commission has ruled, under a similar fact situation, that relying on assistance from a paid consultant is not a reason to deny integration credit. *See Oliver Kelley And Mary Kelley*, 6 FCC Rcd 7377, 7379 (Rev. Bd. 1991).

191. HPI urges that WEDA should be awarded 20% integration credit on the ground that Reardon, the general partner, has been so involved in WEDA's affairs that his ownership interest should be included in the integration calculation. HPI relies heavily on *Eugene Walton*, 6 FCC Rcd 6071, 6076, 6077 (Rev. Bd. 1991). In *Walton*, the Board awarded 20% integration credit to an applicant in

which Reardon was also the 80% limited partner. The determination was grounded on Reardon's role in the filing of the application and the failure of the limited partnership agreement to insulate Reardon from involvement in the applicant.[33] The Commission affirmed the Board's award of 20% integration credit on the basis of the flawed partnership agreement without considering Reardon's role in the filing of the application. *Eugene Walton*, FCC 92-218, released May 28, 1992, paragraph 7.

192. Turning to the facts in this case, the original limited partnership agreement was flawed in the manner found fatal in *Walton*. However, unlike *Walton*, WEDA's agreement was timely amended as a matter of right to provide the necessary insulation.

193. Further, the Commission has made clear that the post-formation record is ordinarily the best evidence of who will control the ongoing license. Pre-formation activities are probative only if the post-formation record is inconclusive as to who will control the ongoing license. *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5601 (1991); *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1434 (1992). There is no evidence here of activities by Reardon during WEDA's post-formation phase. Reardon's activities were confined solely to the pre-formation period. Moreover, the post-formation record reliably demonstrates that, in accordance with her formal status as general partner, Fritschi will have exclusive managerial control of the applicant.

194. The record reflects that Reardon located Fritschi with the assistance of a local Congressman. Also, Reardon gave Fritschi a draft limited partnership agreement, recommended a communications attorney and arranged for financing the construction and operation of the proposed station. All of these activities occurred in WEDA's pre-formation period. Significantly, the record reflects that even during the pre-formation period, Fritschi acted independently of Reardon. Thus, prior to proceeding with the Homewood application, Fritschi contacted several people to learn more about Reardon and the application process. Also, Fritschi had her local attorney review the draft Partnership and make changes, which Reardon accepted.

195. More important, the record reflects no involvement by Reardon in the post-formation period. On the other hand, Fritschi has been an active participant. Briefly recited, in concert with her lawyer, Fritschi worked to complete the application and personally drafted the EEO Program and the Program Service statement. In addition, she personally contacted the transmitter site owner, negotiated a price for acquiring the site, and obtained his approval to use the property as the transmitter site. Also, she established a money market account, for which she is the only authorized signatory; hired a CPA to prepare tax and accounting records; established the local public inspection file; prepared and made arrangements for local newspaper publication of notices; and contacted financial and engineering consultants recommended by her attorney. Also, Fritschi has a substantial financial stake in the application. Fritschi is responsible for 15% of the costs and had contributed as of the hearing $7000 to $8000 towards the cost of prosecuting the WEDA application. In addition, she has committed to provide $63,000, i.e. 15% of the estimated construction and operating costs. In view of the foregoing, WEDA has met its burden of demonstrating that Reardon is a passive owner and that WEDA's ownership structure reliably reflects the manner in which control will be exercised. WEDA is entitled to 100% quantitative integration credit. *See Coastal*, supra.

196. WEDA and Damsky argue that Hopkins and Ellison have been owners since the early fall of 1988, long before they became shareholders in HPI. They urge that HPI should receive, at a maximum, 60% quantitative integration credit. Their contention rests solely on the notations on checks Hopkins and Ellison gave to Homewood Partners in August 1988, at the behest of Huff. The contention is baseless. Huff, Hopkins and Ellison have all testified that the checks represented loans to Homewood Partners and they received nothing from Huff other than Huff's promise of repayment. The making of the small loans did not give Hopkins and Ellison an ownership interest in Homewood Partners or even an option to acquire an ownership interest in the future if and when a corporation was formed. The record reflects, in this regard, that Hopkins and Ellison were given no guarantees they would be offered ownership interests if a corporation was formed. Moreover, Hopkins and Ellison made clear that the notations were made only to indicate their interest in acquiring a 20% interest in the event the general partnership reorganized as a corporation. The testimony of Huff, Ellison and Hopkins, which the Presiding Judge finds to be credible, is buttressed by the fact that neither Ellison or Hopkins have been involved in partnership affairs or performed any services for the partners. Further, Homewood Partners' contemporaneous handwritten account ledger, kept by Huff, reveals that Homewood Partners and HPI have treated these monies as loans since their receipt, and not as consideration for ownership interests. In sum, the record establishes, contrary to the contentions of WEDA and Damsky, that ownership interests were not conveyed to Hopkins and Ellison until HPI's formation. There is no justification for reducing HPI's quantitative integration credit.

197. WEDA also argues that HPI should not receive credit for Ms. Huff's integration pledge since, according to WEDA, Ms. Huff has been uninvolved in the prosecution of HPI's application. The contention is groundless. Ms. Huff is proposed as the station's full-time program director, a staff position accorded particular weight by the Commission since it connotes that Ms. Huff will play an important role in the management of the station. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). Further, Ms. Huff has pledged to eliminate all conflicts, including her current employment, in order to effectuate her integration commitment. WEDA submitted no evidence demonstrating that Ms. Huff will not or cannot fulfill her integration commitment.

198. Moreover, WEDA's argument that Ms. Huff has been uninvolved in the prosecution of HPI's application is not supported by the record. The record indicates that Ms. Huff has been kept fully informed concerning the prosecution of the application and has participated in the applicant's decision making. Thus, among other things, she discussed with her husband the allotment of a Homewood, Alabama frequency (Tr. 727), the costs of the project (Tr. 730) as well as other aspects of the business venture (Tr. 738), and attended and participated in decisions made at partnership meetings (Tr. 758-760). Further, she reviewed the application prior to its filing (Tr. 749), reviewed early correspondence from HPI's original communications counsel (Tr. 731) spoke to HPI's current counsel when HPI was looking for new counsel (Tr. 731), and reviews

the HPI file that is kept at the house (Tr. 743). Moreover, the fact that Ms. Huff has been less active than Mr. Huff or Ms. Lee is of no consequence where, as here, the record firmly establishes that Ms. Huff will play a true and active role in management. In the absence of evidence that Ms. Huff will not carry out her integration credit, there is no basis for reducing HPI's integration credit. *See McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269 (Rev. Bd. 1990). HPI is entitled to 100% quantitative integration credit.

Integration-Qualitative

199. Of the three applicants, HPI is clearly the strongest. HPI is entitled to substantial credit for 100% minority ownership participation. Damsky and WEDA have no minority ownership. All three applicants claim credit for female participation. However, in accordance with the decision in *Jerome Thomas Lamprechi v. FCC*, No. 88-3995 (D.C., Cir. February 19, 1992), no enhancement credit for female ownership can be awarded. In addition, all three applicants merit credit for long term local residence and significant civic participation. Civic activities are considered with local residence as a unified comparative factor. *Ronald Sorenson*, 6 FCC Rcd 1952 (1991). WEDA receives a slight preference on the basis of Fritschi's 22 year residence in the community of license. Damsky has lived in the service area for 18 years. With respect to HPI, while Lee is a life-time resident of the service area and has lived in Homewood for the past 36 years, the Huffs (66 2/3 voting stockholders) have lived in Birmingham, a contiguous community to Homewood,[34] for only 14 years. The Huffs propose to move to Homewood if its application is granted. However, WEDA's slight preference does not overcome HPI's substantial minority preference. Damsky is ranked third. There are no other enhancements to be considered.

Auxiliary Power

200. All three applicants propose auxiliary power. All receive the slight credit accorded for such purposes and are all equal under this criterion.

Comparative Coverage

201. All of the areas proposed to be served are currently served by in excess of five primary, fulltime aural services. In addition, the differences in the areas and populations to be served are so slight as to be non-decisional. Therefore, none of the applicants merits a preference.[35]

Comparative Summary

202. HPI is the clear winner by virtue of its substantial minority enhancement preference. WEDA's very slight local residence/civic activities preference does not overcome HPI's minority enhancement advantage. Damsky is ranked third. HPI's application is granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[36] the application of Homewood Partners, Inc. for a construction permit for a new FM station on Channel 247A in Homewood, Alabama IS GRANTED; and the application of Heidi Damsky and WEDA, Ltd. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] *See, Order*, FCC 91M-984, released March 18, 1991 (Leibensperger FM, Inc.; Homewood Associates; Homewood FM Broadcasting; Roxy Communications, Inc.; and Carter-Sigmon, Inc.); *Order*, FCC 91M-2377, released August 2, 1991 (Southern Broadcasting Limited Partnership); *Memorandum Opinion and Order*, FCC 91M-2576, released August 19, 1991 (Homewood Community Broadcasters, Ltd.), *aff'd, SBM Communications, Inc.*, 6 FCC Rcd, FCC 91R-96, released November 6, 1991; *Order*, FCC 91M-2617, released August 22, 1991 (SBM Communications, Inc.); *Order*, FCC 91M-2981, released October 2, 1991 (George I. O'Rear); *Order*, FCC 91M-3192, released November 1, 1991 (George W. Barber, Jr.).

[2] As originally designated, HPI was a three person general partnership between Willie Huff, Deborah Huff, and Adrienne F. Lee d/b/a Homewood Partners. By the Presiding Judge's *Memorandum Opinion and Order*, FCC 91M-1918, released June 18, 1991, HPI became the successor in interest to Homewood Partners.

[3] Damsky offered a "Reconstructed Budget," (Damsky Ex. 10, p. 2), which was rejected by the Presiding Judge. (Tr. 1163, 1172-1173). This document was not prepared until June, 1991 (Tr. 1132). Ms. Damsky had no role in preparing this document (Tr. 1137), which was prepared primarily by Benns. She did not question him about the accuracy of the cost figures until the morning of the hearing (Tr. 1148).

[4] In 1988, Martin Damsky was the 20% owner of Damsky Paper Company. (Tr. 1095, 1105). He is also the President and Chief Executive Officer of the Company. (Tr. 1087).

[5] A financial qualification issue was added against WEDA as a result of applicant's certification that it was not financially qualified. The reasons for WEDA's non-certification are discussed *infra* at note 7.

[6] Reardon has provided similar letters to other applicants in which he was a partner. (Barber Ex. 6, pp. 20-27; Tr. 516). The aggregate amount covered by those letters was $1,870,000, leaving Reardon nearly $1 million to fund his $392,000 commitment to WEDA.

[7] As discussed, *supra*, WEDA initially certified that it was not financially qualified. Mrs. Fritschi testified that although she spoke to Reardon prior to certifying the application and received his verbal commitment to provide up to $392,000 to WEDA, she did not receive his commitment letter (and the attached Citibank letter) before she certified the application. (WEDA Ex. 6, p. 4). Her communications counsel, Paul C. Besozzi, advised that she could not certify the application without supporting documentation from Reardon. (WEDA Ex. 6, p. 4). Counsel suggested appropriate language for the application form and sent it to her for her review and signature. (WEDA Ex. 6, p. 4). Consequently, WEDA certified in the application that it was *not* yet financially qualified. *Id.* On August 25, 1988, ten days after certifying the application, Mrs. Fritschi received the August 12th letter from Reardon, in which he committed to provide up to $392,000 to WEDA for the Homewood station. (WEDA Ex. 6, pp. 4, 9). She immediately forwarded the letter to communications counsel and assumed that the necessary information was filed

with the FCC. (WEDA Ex. 6, p. 4). The failure to file any amendment was an oversight but was not indicative of the lack of a basis for WEDA's financial qualifications. (WEDA Ex. 6, p. 4).

[8] Reardon testified that he had known Kauffman since Citibank opened its Sioux Falls credit card center. (Tr. 530).

[9] Kauffman testified that his receiving the letter was confirmed by his initials and the date "5/11/87" that he had noted on the face of the letter. (Tr. 1050).

[10] Gullickson represented Kauffman at the hearing in his capacity as counsel to Citibank. (Tr. 1046-1047). Reardon's request letter bears the notation "faxed to CG," which Kauffman testified refers to Gullickson. (Barber Ex. 9, 1; Tr. 1052).

[11] Reardon had estimated that his interest in the station was between $1.3 million and $2.25 million. (WEDA Ex. 11, p. 2). Reardon's financial statement listed the interest in the station at $1.3 million. (Barber Ex. 9, pp. 3-4).

[12] The Scott Reardon Trust has since been renamed the New Dakota Investment Trust. (Tr. 604). The value of assets held by the New Dakota Investment Trust as of September 25, 1991, the date of Reardon's testimony, was in excess of $1 million. (Tr. 605).

[13] Reardon acknowledged receiving the transmittal letter. (Tr. 581).

[14] The Bank normally has a borrower pay legal expenses when the Bank consults with outside counsel, whether or not it funds a commitment. (Tr. 1063). In any event, Reardon had offered to pay the fees and, in fact, did so.

[15] Kauffman originally proposed to charge Reardon a commitment fee of 1/2 of 1% per annum payable quarterly in advance. (WEDA Ex. 18, p. 2). This was Citibank's normal commitment fee. (Tr. 1059-1060).

[16] It was Reardon's understanding that the letter had been referred to the Bank's loan committee, based upon his conversations with Messrs. Kauffman and Rowenhorst, who are two members of the committee. (Tr. 558, 560). Indeed, it was Reardon's testimony that as of the date of the hearing, he still thought that the letter had gone to committee review.

[17] Reardon understood the letter to have been issued based upon his personal financial situation. (Tr. 614).

[18] Reardon understood that his "involvement" would be as an "investment", not someone in management. (Tr. 613).

[19] The July 23rd Letter also provided that Reardon might be a principal on his own or a general partner in a particular venture. (WEDA Ex. 10, p. 1; Tr. 1082).

[20] Fritschi also understood that he did not want to be deposed. (Tr. 390).

[21] WEDA reported its new financial proposal in a "Petition for Leave to Amend," filed August 23, 1991, which the Presiding Judge granted by *Memorandum Opinion and Order*, FCC 91M-3414, released December 10, 1991.

[22] Reardon never discussed with Siebert why there had not been included any provision for additional capital contributions. (Tr. 507-508).

[23] Reardon is now primarily in the cellular telephone business, as well as other common carrier communications businesses. (Tr. 444). He had filed his Haysville application in 1981 or 1982. (Tr. 445). Siebert had represented him in that application. (Tr. 445). He ultimately obtained the construction permit for the Haysville station. (Tr. 446). He sold his interest in the Haysville station approximately 3 years after it had been licensed. (Tr. 447).

[24] The steps that Fritschi took to determine her ability to meet her own 15% share of the financial qualifications certification was discussed, *supra*. *See* paragraphs 40-41.

[25] Reardon had provided commitment letters similar to his August 12, 1988 letter to WEDA to other applicants in which he was a limited partner. (Tr. 403-405; Barber Ex. 6, pp. 20-27). His aggregate commitments to those other applicants was $1,870,000. Fritschi first saw those letters in 1991. (Tr. 403-405). Those applicants had also relied upon cost estimates prepared by Karas. (Tr. 416-419; Barber Ex. 6, pp. 20-27). Fritschi did not know that Karas had consulted with other applicants in which Reardon was a partner until 1991. (Tr. 421).

[26] The application has been subsequently dismissed pursuant to a settlement agreement.

[27] The Prairie Rose application was dismissed pursuant to a Joint Request for Approval of Settlement. *See*, *Memorandum Opinion and Order*, FCC 91M-2510, released August 14, 1991.

[28] Huff and Hopkins have pay grades 5 (Tr. 967).

[29] Huff entered the loans in the ledger either on the date of receipt or deposit (Tr. 829).

[30] Ms. Damsky offered no testimony concerning her current financial qualifications and no finding can be made as to her current financial qualifications.

[31] Reardon's and Fritschi's fund commitments resulted in a total of $451,000 available to WEDA.

[32] Although Damsky has been disqualified, Damsky's comparative attributes have been considered.

[33] The Agreement did not prohibit Reardon from communicating with the general partner about the day-to-day business of the partnership. Also, it authorized Reardon to make a determination, concerning the general partner's competence and to replace her as general partner, instead of placing the responsibility for that determination with a court of competent jurisdiction.

[34] Residence within a community contiguous to the proposed community of license is treated as equal in importance to residence within the proposed community. *Minority Broadcasters of East St. Louis*, Inc., 99 FCC 264, 269 (Rev. Bd. 1984).

[35] None of the applicants claim a comparative coverage preference.

[36] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 11, 1992

COMMENTS INVITED ON GEORGIA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Georgia (Region 10).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 10 consists of the State of Georgia (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **September 17, 1992** and reply comments on or before **October 2, 1992.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-189 Georgia-Public Safety Region 10.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 12, 1992

COMMENTS INVITED ON DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR DOMESTIC TELEPHONE CARRIERS.

The Common Carrier Bureau invites comments on proposed depreciation rates and amortizations for 13 local exchange carriers (LECs). The proposed rates for these LECs were developed in conjunction with the Commission's standard review procedures, and, as such, reflect a thorough review of all depreciable telephone plant accounts.

Each of the 13 carriers submitted studies to the Commission in support of its proposed depreciation rates. The carriers' submissions were reviewed by the staffs of the state public utility commissions and the Common Carrier Bureau. The carriers' studies and the corresponding staff reviews were discussed in correspondence, telephone conversations, and/or conferences. Each of the carriers thereafter formally filed updated studies which contained the data required by Section 43.43 of the Commission's rules. The rates filed by the carriers are consistent with those proposed by the Bureau staff for all carriers except New York Telephone. New York Telephone filed different rates for four accounts (Analog ESS, Toll Aerial Cable, Toll Underground Cable and Toll Buried Cable) which are lower than those proposed by the Bureau staff.

The Attachment lists the 13 LECs and the affected jurisdictions. This Attachment also lists the proposed expenses and composite rates for the LECs, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations), and the percentage change in expenses (proposed vs. current).

The Bureau staff is recommending the life, salvage, and curve shape parameters which underlie the expenses and composite rates shown on the Attachment. These expenses are estimated annual amounts and may not reflect actual expenses because January 1, 1992 plant balances are used and the proposed rates may not be applicable for the entire year.

Copies of the carriers' initial 1992 depreciation rate study submissions, the Bureau staff's preliminary reports on these submissions, the rate filings and other data supporting the proposed rates are available for public inspection in Suite 257, 2000 L Street N.W., Washington, D.C. Copying facilities are available in Suite 812, 2000 L Street. Copies are also available from the Downtown Copy Center, Suite 640, 1990 M Street, N.W., Washington, D.C.

Parties wishing to file comments on the proposals summarized herein may do so by **September 2, 1992.** Replies may be filed by **September 18, 1992.** Comments and reply comments should include in the caption a reference to file no. AAD 92-67. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch, (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Carrier - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Expense	Percent	Expense	Percent	Expense	Percent
	($000)	($000)	(%)	($000)	(%)	($000)	(%)
BELL OF PENNSYLVANIA	7,741,530	482,798	6.2	604,541	7.8	121,743	25.2
C&P OF DISTRICT OF COLUMBIA	1,223,341	92,414	7.6	105,696	8.6	13,282	14.4
C&P OF MARYLAND	4,506,991	285,594	6.3	326,913	7.3	41,319	14.5
GTE SOUTH-Florida	3,196,218	205,475	6.4	275,331	8.6	69,856	34.0
GTE WEST-Hawaii	1,311,656	80,134	6.1	81,895	6.2	1,761	2.2
INDIANA BELL TELEPHONE	2,786,004	182,340	6.5	193,630	7.0	11,290	6.2
MICHIGAN BELL	6,946,475	469,912	6.8	538,168	7.7	68,256	14.5
NEW YORK TELEPHONE	16,842,817	1,178,188	7.0	1,429,201	8.5	251,013	21.3
BELLSOUTH TELECOMMUNICATIONS							
Florida	8,850,003	592,859	6.7	631,693	7.1	38,834	6.6
Georgia	6,184,346	443,942	7.2	460,996	7.5	17,054	3.8
North Carolina	3,353,330	242,783	7.2	250,974	7.5	8,191	3.4
South Carolina	2,258,244	155,321	6.9	169,602	7.5	14,281	9.2
SOUTHWESTERN BELL TELEPHONE							
Arkansas	1,560,778	95,622	6.1	100,278	6.4	4,656	4.9
Kansas	1,890,486	113,080	6.0	128,580	6.8	15,500	13.7
Missouri	3,914,575	226,203	5.8	259,485	6.6	33,282	14.7
Oklahoma	2,450,222	143,757	5.9	143,894	5.9	137	0.1
Texas	13,528,996	806,222	6.0	831,826	6.1	25,604	3.2
UNITED TELEPHONE-SOUTHEAST							
Tennessee	334,516	18,241	5.5	23,208	6.9	4,967	27.2
Virginia	148,687	8,542	5.7	9,431	6.3	889	10.4
West Virginia	224	14	6.2	14	6.2	0	0.0
U S WEST COMMUNICATIONS							
Iowa	1,554,373	78,963	5.1	94,539	6.1	15,576	19.7
Minnesota	2,922,782	170,537	5.8	197,761	6.8	27,224	16.0
Nebraska	1,275,558	102,878	8.1	112,208	8.8	9,330	9.1
North Dakota	547,135	27,740	5.1	38,759	7.1	11,019	39.7
South Dakota	563,356	29,173	5.2	37,614	6.7	8,441	28.9
WISCONSIN BELL	2,575,521	163,194	6.3	187,635	7.3	24,441	15.0
TOTAL	98,468,164	6,395,926	6.5	7,233,872	7.3	837,946	13.1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ASIAN AMERICAN TELECOM File No. I-T-C-92-124

Application for Authority Under
Section 214 of the Communications
Act of 1934, as amended, for the
provision of IBS, INTELNET and
International Television Service,
and to Establish Channels of
Communication between the United
States and Russia for the provision
of switched voice and data services

ORDER AND AUTHORIZATION

Adopted: August 10, 1992; Released: August 19, 1992

By the Chief, International Facilities Division:

1. The above-captioned application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, by Asian American Telecom (AAT) requests authority to acquire and operate facilities over INTELSAT for the provision of switched voice and data services between the United States and Russia,[1] and for the provision of IBS, INTELNET and International Television Service between the United States and various international points. We placed the application on public notice March 18, 1992. No comments were filed.

2. AAT states that it will provide its international services pursuant to traditional, revenue-splitting operating arrangements with foreign correspondents, with AAT providing international half-circuits.[2] According to AAT, for traffic between Russia and the United States, AAT will retain its share of the accounting rate less its payment to HawTel for use of HawTel's earth station and facilities in Hawaii, and less any payment to U.S. connecting carriers.[3] Finally, AAT notes that it will provide transiting service between Russia and other points throughout the world, that it will split transit fees with HawTel and that HawTel will be responsible for the routing of traffic after AAT transits the traffic in Hawaii.[4]

3. Upon consideration of the instant application, we find that the public convenience and necessity would be served by AAT's provision of switched voice and data services between the United States and Russia, and by AAT's provision of IBS, INTELNET and International Television Service between the United States and various international points.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-92-124 IS GRANTED, and AAT is authorized to:[5]

a. establish channels of communications between GTE Hawaiian Telephone (HawTel) earth stations in Hawaii and an appropriate INTELSAT satellite in the Pacific Ocean, for the provision of IBS, INTELNET and International Television Service between the United States and countries listed in Comsat's tariff F.C.C. No. 103 for the space segment of IBS, INTELNET and International Television Service;

b. lease from Comsat and operate 512 kbps of capacity between HawTel earth stations in Hawaii and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Russia,[6] for the provision of switched voice and data service between the United States and Russia;

c. lease and operate appropriate domestic connecting facilities between the HawTel's earth stations and AAT's operating center.

5. IT IS FURTHER ORDERED that our authorization of AAT to provide private lines is limited to the provision of such private lines only between the United States and those countries authorized under Comsat's tariff F.C.C. No. 103 -- that is, private lines which originate in the United States and terminate in one of the countries authorized for IBS service under Comsat's tariff, or which originate in one of the foreign countries authorized for IBS service under Comsat's tariff and terminate in the United States. In addition, AAT may not -- and AAT's tariff must state that AAT's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

6. IT IS FURTHER ORDERED that neither AAT nor any persons or companies controlling or controlled by AAT, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which AAT or any persons or companies controlling or controlled by AAT are parties.

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between AAT and its correspondent in each of the countries to which it is authorized to provide service, and AAT shall file copies of the agreement with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. § 43.51(a)(3)).

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other autho-

rized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 C.F.R. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

10. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

11. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. § 63.10(b), for INTELSAT satellite circuits.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its application AAT states that it intends to provide access in foreign countries "to diverse points therein and beyond." We note that should AAT obtain any interest in facilities beyond Russia or any other point served by AAT, for the purpose of providing common carrier services, including private line service, between the United States and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for AAT to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[2] *See* Letter, dated June 23, 1992, from Shirley Fujimoto, Attorney for AAT.

[3] *See* Letter, dated August 7, 1992, from Shirley Fujimoto, Attorney for AAT.

[4] *See* Letter, dated July 10, 1992, from Shirley Fujimoto, Attorney for AAT (*July 10 Letter)*; Letter, dated August 7, 1992, from Shirley Fujimoto, Attorney for AAT.

[5] AAT withdrew a request to lease capacity in various common carrier cable systems in the Pacific Ocean. *See July 10 letter.*

[6] AAT states that it has no ownership or controlling interest in foreign facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-92-053

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in a Digital Submarine Cable System between China and Japan.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: August 10, 1992; Released: August 19, 1992

By the Chief, Common Carrier Bureau:

1. The Commission has under consideration the above-captioned application filed on December 9, 1991 by American Telephone and Telegraph Company ("AT&T"). AT&T seeks authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214 (1982), to (1) acquire and operate capacity in a digital submarine cable system, known as the China-Japan Cable System extending between Nanhui, Shanghai City, China and Miyazaki, Japan; (2) acquire by lease extension facilities necessary to extend the acquired capacity; and (3) activate the capacity. The China-Japan Cable will be owned by AT&T, Kokusai Denshin Denwa Co., Ltd. (KDD) and the Directorate General of Telecommunications in the Ministry of Post and Telecommunications of the People's Republic of China ("DGT") (hereinafter collectively called Co-owners). The Co-owners propose a Ready for Service (RFS) date of December 15, 1993. We placed the application on public notice on December 11, 1991. We received no comments.

2. AT&T will use the China-Japan Cable to supplement its existing facilities providing the services which it is currently furnishing or may subsequently furnish.[1] The China-Japan Cable will be extended by suitable facilities to the borders of other countries, including the United States, or to the terminals of other international communications systems, including other cable terminals and satellite earth stations, enabling the provision of services between and among the United States, China, and Japan.

3. As defined in the Construction and Maintenance Agreement (C&MA)[2] initialed on October 26, 1991, the China-Japan Cable will consist of three segments. Segments A and C are, respectively, the cable stations at Nanhui, Shanghai City, China and at Miyazaki, Japan. Segment B consists of the whole of the submarine cable between and including the associated nominal 140 Megabits per second (Mbps) digital input/output ports at the Segments A and C Cable Stations.

4. The configuration of the China-Japan Cable is based on one working optical fiber pair, the Design Capacity of which is provided in four 140 Mbps streams with each stream containing 63 Minimum Investment Units (MIUs)[3] for a total capacity of 252 MIUs, equalling 7,560 64-Kbps circuits. For voice telephone requirements, digital circuit multiplication systems (DCMS) can be employed to derive nominally five times the original virtual voice paths.

5. The estimated total cost of the submarine cable portion (Segment B) of the China-Japan Cable is $75.9 million, not including the costs of the cable stations (such as land/building, structure, power plant, multiplexer under 140 Mbps, etc.) and operation and maintenance costs after the system RFS date.[4] As DGT requires full ownership and responsibility for the costs of the cable station located in its country, DGT will bear 100% of the costs of Segment A. Consequently, the parties agree to bear the costs of Segment B disproportionately to reflect the (relatively higher) costs of Segment A for DGT.[5] Specifically, under the terms of the C&MA, the capital costs of Segment B will be shared on the basis that DGT, as the Western Party, will pay up to $27 million of these costs and the Eastern Parties[6] will pay the remaining capital costs.[7] However, the operating and maintenance costs of Segment B will be shared on a 50/50 basis between DGT and its correspondents.[8] The Eastern Parties will share equally in the costs of Segment C (the cable station in Japan).

6. The estimated original capital cost per half-MIU is $1.38 million, excluding interest during construction, currently estimated to be $150,000 per half-MIU. The current Notional Capacity (the total assigned capacity) of the China-Japan Cable is 40 MIUs.[9] AT&T's current percentage interest in the China-Japan cable is 25%, as set forth in Schedule B of the C&MA. With initial ownership of 20 jointly assigned MIUs[10], AT&T's initial share of the estimated capital cost is $27.6 million, plus $3 million in interest during construction.[11] At full subscription, the half-MIU cost will be $219,800 for an Eastern Party, plus $23,800 in interest during construction.[12] Both prior and subsequent to the system RFS date, carriers including non-owners may acquire capacity in the China-Japan Cable by ownership, Indefeasible Right of User (IRU), lease or other mutually agreed upon arrangements.

7. Upon review, we find that grant of AT&T's application to acquire and operate capacity in the China-Japan Cable System will be in the public interest. This cable system represents the introduction of the first fiber optic submarine cable system to the People's Republic of China. By providing additional digital connectivity with other cable systems within the Pacific Ocean Region, the China-Japan Cable System will sharpen intermodal and intramodal competition, meet consumer preferences and provide service quality benefits, such as path diversity, media diversity and restoration capability.

8. Accordingly, IT IS ORDERED that application File No. I-T-C-92-053 IS GRANTED subject to the following terms, conditions and limitations and AT&T is authorized to:

(a) acquire, on an ownership basis, and operate capacity in the China-Japan Cable System, in twenty (20) half-MIUs as specified in Schedule D;

(b) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the China-Japan Cable System in China and Japan;

(c) activate capacity in the China-Japan Cable System and aforementioned extension facilities for the provision of AT&T's authorized telecommunications services.

9. IT IS FURTHER ORDERED that AT&T shall make available half-interests in the China-Japan Cable System's capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

10. IT IS FURTHER ORDERED that AT&T's tariffs must state that its customers may not resell international private lines or connect them to the public switched network for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a country-specific finding of resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

11. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate AT&T's interests in capacity herein authorized, as the public interest may require to accommodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and, further, jurisdiction is retained by the Commission over all matters relating to AT&T's ownership, management, maintenance, and operation of the cable system as authorized herein, to assure the most efficient use not only of this cable system, but of all means of communications between China and Japan served by the China-Japan Cable System.

12. IT IS FURTHER ORDERED that AT&T shall include China-Japan Cable facility use in the monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

13. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCMS, multiplexing and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

14. IT IS FURTHER ORDERED that AT&T, as a dominant carrier, pursuant to the Commission's decision in CC Docket No. 85-107[13] shall neither dispose of any interest in China-Japan Cable capacity it is authorized to acquire to any entity on an ownership basis nor dispose of any interest in any such capacity in any way to a non-U.S. telecommunications entity without prior authorization of the Commission.

15. This order is issued under Section 0.291 of the Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

FOOTNOTES

[1] Initially, AT&T may not be certified to serve directly all countries or territories which the facilities covered by this application are capable of serving. AT&T, proposing extension of its services into such territories by means of the China-Japan Cable, will seek such appropriate authorization as may be required when it proposes to activate the facilities.

[2] *See* Application, Attachment B.

[3] A MIU is defined in the C&MA as a unit of ownership designated as the minimum unit of investment, providing 2,048 usable Mbps and the additional 162,539.68 bits per second required for multiplexing in each direction.

[4] AT&T Submarine Systems will be the supplier of the China-Japan system.

[5] The costs of the China cable station are significantly greater than the Japan cable station for several reasons. The Japan cable station is already designed and equipped to handle fiber optic cables, whereas such technology is new to China. In addition, as there is no objective "market price" on the cable station property, it would have been a very arduous task to assign a price. Furthermore, the owners saved an indeterminate amount of costs by avoiding the need to arrive at a mutually acceptable appraisal. *See* Supplement to Application, p.3.

[6] The "Eastern Parties" include AT&T, KDD and any subsequent owners on the eastern end of the cable.

[7] Despite the disproportionate cost-sharing of Segment B, AT&T asserts that the costs of fiber optic capacity from the United States to China using the China-Japan Cable are more favorable than any of the several alternatives under consideration at the time this cost methodology was developed. In addition, as China has no connecting facilities to its neighboring countries, AT&T states that there was no available alternative access to China. *See* Supplement to Application, p.3.

[8] *See* Application, Attachment B (Schedule C).

[9] Subject to terms and conditions set forth in Attachment B, any co-owner may request an increase in the Notional Capacity. The Common Reserve Capacity (the difference between the Design Capacity and the Notional Capacity) is held collectively by the Co-Owners in common undivided shares in the same proportions as their percentage interests in the cable system. The Underwritten Capacity is the assigned capacity constituting the difference between a Party's jointly agreed upon MIU capacity requirements and its jointly assigned MIU capacity.

[10] The Eastern Parties will also hold 4 jointly assigned MIUs each as Underwritten Capacity. *See* Application, Attachment B, Schedule D.

[11] The Co-owners expect the China-Japan Cable system to be fifty percent (50%) susbscribed by the December, 1993 RFS date.

[12] The Co-owners have agreed that the unsold capacity is to be held in a pool which will diminish proportionately the owners' costs, as the capacity is sold to other entities.

[13] *See* International Carrier Policies, 102 FCC 2d 812, 822 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-92-144

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communications for use in the provision of common carrier space segment service between the United States and all earth stations on Guam and American Samoa

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: August 7, 1992; Released: August 19, 1992

By the Chief, International Facilities Division:

1. On April 7, 1992, the Communications Satellite Corporation (Comsat) filed the above-captioned application requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, to provide Intelsat space segment for common carrier satellite services between the United States and its territories of Guam and American Samoa. Comsat requests blanket authority to serve an earth station on Guam recently authorized to MCI International, Inc.,[1] an earth station on Guam proposed by AT&T,[2] and all others that may be subsequently built on Guam or American Samoa.

2. In support, Comsat maintains that it has served Guam and American Samoa for the past twenty years. It distinguishes Guam and American Samoa from other non-contiguous points in that they are not served by U.S domsats. Comsat states that, at present, it must request individual authority to serve each earth station on Guam or American Samoa. Comsat therefore requests blanket authority to serve earth stations on Guam and American Samoa, but expresses its continued willingness to file for authority on an earth station-by-earth station basis for other non-contiguous points.

3. In *Communications Satellite Corporation*, 6 FCC Rcd 2891 (1991), we found that the public interest would be served by authorizing Comsat to communicate with earth stations in other countries participating in the Intelsat system on a country-by-country basis. We found that the previous practice of authorizing Comsat on an earth station-by-earth station basis had become increasingly burdensome for Comsat and the Commission. We concluded that our regulatory responsibilities could be adequately satisfied by authorizing Comsat to communicate with earth stations on a country-by-country basis. However, we decided not to grant blanket authority for Comsat to provide service between the United States mainland and points in the non-contiguous United States. We made this decision because of a number of contested applications that were currently pending for such service.

4. We conclude that it will be in the public interest to grant Comsat blanket authority to provide service between the United States and its territories of Guam and American Samoa. This application has not been contested, as have applications to serve some other non-contiguous points. Thus, this authorization will allow Comsat to provide service to customers at these points in a more efficient manner without unnecessary regulatory delays.

5. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, IT IS ORDERED that the application of the Communications Satellite Corporation, File No. I-T-C-92-144, IS GRANTED and Comsat is authorized to establish and operate common carrier channels of communication via Intelsat space segment for the provision of authorized services between the United States and all earth stations on Guam and American Samoa.

6. IT IS FURTHER ORDERED that Comsat shall, pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, maintain a tariff for the services authorized in this order.

7. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] MCI International, Inc., 7 FCC Rcd 2215 (1992).

[2] File No. CSG-91-047-P/L.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Transmittal No. 247
Tariff F.C.C. No. 1

ORDER ON RECONSIDERATION

Adopted: August 12, 1992; Released: August 19, 1992

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. The above-captioned transmittal, filed on June 17, 1988, by the Bell Atlantic Telephone Companies (Bell Atlantic), became effective on August 23, 1988. By that transmittal, Bell Atlantic replaced its existing six special access mileage bands with a single, fixed, per-mile rate structure and eliminated the separate channel mileage charge for WATS access lines (WALs) and WATS access lines extensions (WALEs). In an Order released August 22, 1988, the Bureau denied a petition to investigate and a petition to reject or, in the alternative, suspend and investigate, filed on July 5, 1988, by American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI), respectively. On September 21, 1988, MCI filed a petition requesting that the Bureau reconsider its August 22, 1988, Order and reject the instant transmittal, or, in the alternative, suspend and investigate it (MCI Petition). By this Order, we dismiss MCI's petition.

II. PLEADINGS

2. As grounds for its petition, MCI argues that the terms of the tariff are unjust and unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), are discriminatory under Section 202 of the Act, 47 U.S.C. § 202, and contravene well-settled Commission policies established in the Report and Order in CC Docket No. 86-1[1] and implemented in the Bureau's Order on the Midyear 1986 access tariff filings.[2] MCI Petition at 4-5.

3. In particular, MCI contends that permitting Bell Atlantic to eliminate the WATS access channel mileage charge and transfer the costs previously projected to be recovered from that charge to the general pool to be recovered from non-WATS special access users, rather than from Bell Atlantic's shareholders, allows WATS users to enjoy unjustly low rates in violation of Section 201(b) of the Act, 47 U.S.C. § 201(b). MCI Petition at 8. Furthermore, MCI argues, the resultant shift in the cost of this service to non-WATS users subjects them to unjust and unreasonably high rates which likewise contravene Section 201(b). *Id.* at 4-5. MCI also maintains that this pricing differential discriminates in favor of WATS users and against non-users, and is thus unlawful pursuant to Section 202 of the Act, 47 U.S.C. § 202.[3] Finally, MCI argues that the Bureau acted in flagrant disregard of the Commission policy set forth in CC Docket 86-1, which expressly provides that WALs and WALEs are to be priced in the same manner as other special access lines. *Id.* at 5-6.

4. Bell Atlantic filed its opposition to MCI's petition on October 5, 1988 (Bell Atlantic Opposition). Charging that MCI's petition is neither procedurally nor substantively sound, Bell Atlantic argues that pursuant to Section 204 of the Act, 47 U.S.C. § 204, the Commission may not suspend a tariff that has already gone into effect; it thus lacks the authority to grant the relief requested by MCI. Bell Atlantic Opposition at 1. Further, Bell Atlantic contends that under the terms of Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, a party may not request rejection of a tariff that has already gone into effect. *Id.* at 2 and n.2. Bell Atlantic also deems MCI's petition substantively lacking because no new facts or legal arguments are presented therein, and it contains no demonstration that the Bureau's original decision was erroneous.

5. Bell Atlantic also believes that the Bureau's action was wholly justified because the revisions implemented by Transmittal 247 merely accelerate the elimination of WALE charges that would naturally result from the conversion of its end offices to WATS. By permitting this step now, says Bell Atlantic, rather than maintaining the confusing and increasingly obsolete current WALE offering, the Bureau's Order advanced the public interest by simplifying ordering, billing, and administration of WATS service. *Id.* at 4. Finally, Bell Atlantic argues that its overall channel mileage revenues were appropriate because Bell Atlantic's earnings for Special Access were already below authorized levels. *Id.* at 5.

6. On October 17, 1988, MCI filed a reply to Bell Atlantic's opposition (MCI Reply). MCI argues that its request for rejection is not barred by the Bureau's earlier actions, as such action may be taken pursuant to Section 205 of the Act, 47 U.S.C. § 205, at any time. MCI Reply at 2. MCI further responds that the Bureau may reconsider its earlier action that did not take into account the specific policies set forth in CC Docket 86-1. *Id.* at 4-6. Finally, MCI contends that Bell Atlantic's failure to earn its authorized return on the overall Special Access category does not give Bell Atlantic license to discriminate in its pricing among the different users of Special Access services. *Id.* at 6.

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[1] WATS-Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1, 59 RR 2d 1418 (1986), *recon. denied*, 62 RR 2d 36 (1987).

[2] Midyear 1986 Access Tariff Filing, Memorandum Opinion and Order, 1 FCC Rcd 1247 (Com.Car.Bur. 1986).

[3] MCI claims that this is so because, unlike users of WATS channel mileage, non-WATS users of special access will continue to have to pay for their channel mileage along with an additional amount assessed by Bell Atlantic in order for it to recover the costs previously recovered from users of WATS channel mileage. MCI Petition at 11.

III. DISCUSSION

7. After review of the instant petition for reconsideration, we conclude that dismissal is warranted pursuant to Sections 1.102(b)(2) and 1.106(a)(1) of the Commission's Rules, 47 C.F.R. §§ 1.102(b)(2), 1.106(a)(1), which preclude reconsideration of interlocutory actions. An Order denying a petition to reject tariff revisions is merely a determination that a tariff revision is not patently unlawful. Such a decision would not preclude a determination that the tariff revision is unlawful in a subsequent proceeding initiated pursuant to Sections 208 or 403 of the Act, 47 C.F.R. §§ 208, 403. Moreover, a decision to deny a petition to investigate is not subject to reconsideration. Such a decision is provisional in nature because it does not preclude the Commission from initiating an investigation of the tariff provisions in question at a later date and does not preclude aggrieved persons from filing a complaint under Section 208 of the Act, 47 U.S.C. § 208, to challenge the rates or provisions in question. Accordingly, such limited decisions are interlocutory actions within the meaning of Sections 1.102(b)(2) and 1.106(a)(1).[4]

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that, pursuant to Sections 1.102(b)(2) and 1.106(a)(1) of the Commission's Rules, 47 C.F.R. §§ 1.102(b)(2), 1.106 (a)(1), the petition for reconsideration filed by MCI Telecommunications Corporation hereby IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Commom Carrier Bureau

[4] *See* American Tel. & Tel. Co., 3 FCC Rcd 3572 (Com.Car.Bur. 1988) (citing Southwestern Bell Tel. Co., 3 FCC Rcd 2010 (Com.Car.Bur. 1988), Erratum, 3 FCC Rcd 2992 (Com. Car. Bur. 1988), AT&T Communications, 1 FCC Rcd 930, 931 (Com.Car.Bur. 1986)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-479

In the Matter of

Quests, Inc. Linesville, Pennsylvania

Licensee of Radio Station
WAST(AM), Ashtabula, Ohio

Order to Show Cause Why the
License of Station WAST(AM)
Ashtabula, Ohio, Should
Not Be Revoked

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1992; Released: August 19, 1992

By the Commission:

1. The Commission has before it an Application for Review filed January 29, 1992, by Phillip J. Cantagallo (Cantagallo) seeking reversal of the *Order of Revocation*, 6 FCC Rcd 3385 (MMB, 1991). The *Order of Revocation* revoked the license of Station WAST(AM), Ashtabula, Ohio, held by Quests, Inc. (hereinafter, "Quests") and dismissed as moot Quests' application for assignment of license (File No. BAL-901113ED) to Cantagallo. Reconsideration of the revocation *Order* was denied by the Bureau by *Memorandum Opinion and Order*, 7 FCC Rcd 29 (1991). Cantagallo seeks review of the Bureau's revocation of the WAST license and reinstatement and grant of his assignment application.

2. In his application for review, Cantagallo complains that the Bureau improperly ignored the efforts of the non-controlling stockholders to obtain control of Quests and to bring the station into compliance with the Commission's rules. Cantagallo argues that the Bureau erred in both its revocation *Order* and denial of reconsideration by failing to consider all of the facts regarding the assignment application. Specifically, Cantagallo contends that the Bureau did not give proper consideration to his showing that the non-controlling stockholders would be capable of returning the station to the air and his showing that the public interest would be served by the restoration of service to Ashtabula. Cantagallo further questions the Bureau's "rigid" application of the policy enunciated in *Second Thursday Corp.*, 22 FCC 2d 515 (1970), *recon. granted*, 25 FCC 2d 112 (1970), to the instant proceeding.

3. The undisputed fact is that WAST(AM) has been off the air since 1981. On November 7, 1990, we released an *Order to Show Cause and Hearing Designation Order*, 5 FCC Rcd 6599 (1990) in which Quests was ordered to show cause why its license should not be revoked for violation of 47 C.F.R. §§ 73.1740(a)(4) and 73.1750. Quests failed to respond to the Commission's *Order*, did not file a notice of appearance and did not appear at the prehearing conference. Accordingly, the Presiding Judge terminated the proceeding. Thereafter, the Bureau revoked the license.

4. Cantagallo fails to raise any matters warranting review of the Bureau's revocation action. That the non-controlling stockholders attempted to acquire control of Quests from the majority stockholder and return the station to the air prior to the issuance of the *Order to Show Cause* is unavailing since they were unsuccessful and the station remained silent. Thus, the revocation was proper. Since the revocation was warranted, the Bureau also was correct in dismissing the assignment application. As the Bureau noted, citing *Jefferson Radio Inc., v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964), "it is the recognized policy of the Commission that assignment of [a] broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited his authorization." See also *Stereo Broadcasters, Inc.*, 74 FCC 2d 543 (1979), *aff'd, Stereo Broadcasters Inc. v. FCC*, 652 F.2d 1026 (D.C. Cir. 1981). The fact that the assignment application was filed after the release of the *Order to Show Cause* further militates against any possible entitlement to equitable relief. Furthermore, Cantagallo's suggestion that the Bureau misapplied the Commission's *Second Thursday* policy is plainly wrong since the Bureau never cited, mentioned or relied upon that case.

5. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on January 29, 1992, by Phillip J. Cantagallo IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-185

In re Applications of

WILLIAM F. O'SHAUGHNESSY (hereafter "O'Shaughnessy")	File No. BPH-910703MK
SHIRLEY A. PENROD (hereafter "Penrod")	File No. BPH-910708ME

For Construction Permit
for a New Commercial FM
Station on Channel 241A
at South Waverly, PA

HEARING DESIGNATION ORDER

Adopted: August 5, 1992; Released: August 19, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Financial.* In response to Item 3, Section III of FCC Form 301 ("Financial Qualifications"), O'Shaughnessy has not provided the name of the contact person of its source of funds at The Curry Corporation. O'Shaughnessy shall submit an amendment to the presiding Administrative Law Judge.

3. *Petition to Deny.* On October 22, 1991, O'Shaughnessy filed a petition to deny which seeks the specification of a real party-in-interest issue against Penrod. Thus, the petition is essentially a petition to specify issues, which does not properly lie at the pre-designation stage and which will therefore be dismissed. Nevertheless, O'Shaughnessy may raise this matter anew post-designation. *See Revised Processing of Broadcast Applications,* 72 FCC 2d 202, 213-15 (1979).[1]

4. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That O'Shaughnessy shall file the amendment, specified in paragraph 2 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. IT IS FURTHER ORDERED, That the O'Shaughnessy petition to deny and the Penrod motion to strike ARE HEREBY DISMISSED.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990). *Erratum,* 6 FCC Rcd 3472 (1991), *recon. granted in part,* 6 FCC Rcd 3403 (1991).

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

[1] In view of this action, the related motion to strike filed on November 22, 1991 by Penrod will be dismissed as moot.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-183

In re Applications of

WESTERN INSPIRATIONAL BROADCASTERS, INC. (hereafter "Western")	File No. BPED-910923MF
BROAD SPECTRUM COMMUNICATIONS, INC. (hereafter "Spectrum")	File No. BPH-910925ME
PHOENIX BROADCASTING, INC. (hereafter "Phoenix")	File No. BPH-910926ME
NINETY-TWO SEVEN LTD. (hereafter "SEVEN")	File No. BPH-910926MF
THE PARK LANE GROUP, INC. (hereafter "Group").	File No. BPH-910925MC (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 224A
in Chico, California

HEARING DESIGNATION ORDER

Adopted: August 5, 1992; Released: August 19, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Hearing Fee.* Group has not paid the hearing fee which was required by April 27, 1992, the date set forth in *Public Notice*, Mimeo No. 13110, released February 21, 1992. *See* revised Section 73.3573(g)(2) of the Commission's Rules and *Report and Order* in Gen. Dkt. 90-264 ("Proposals to Reform the Commission's Comparative Hearing Process"), 6 FCC Rcd 157, 157-158 and 170 (1990), *Erratum*, 6 FCC Rcd 3472, *recon. granted in part*, 6 FCC Rcd 3403 (1991). Accordingly, the application of Group (File No. BPH-910925MC) will be dismissed.

3. *Environmental.* Our engineering study based upon OST Bulletin No. 65 (October, 1985), entitled "Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" ("OST Bulletin"), reveals that Seven did not address, and Phoenix did not sufficiently address, the matter of how they would protect workers on their respective towers from RF radiation exposure. *See* 47 C.F.R. § 1.1307(b). Additionally, an engineering study of Seven's application reveals that in the area immediately surrounding the tower, the combined operation of existing station KKXX(AM), KHAP(FM), K67DY and Seven's proposal may significantly exceed the ANSI limit specified in the OST Bulletin. Consequently, we are concerned that Phoenix and Seven may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 28, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since Phoenix's and Seven's proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65, *supra*, at 28. In regard to the specific question of Seven's compliance with ANSI guidelines for protecting the general public from excessive exposure to RF radiation, if its site is presently fenced in compliance with the guidelines, Seven is required to include a statement to this effect and to give the distance from the base of the tower to the fence. Accordingly, Phoenix and Seven will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. *See* 47 C.F.R. § 1.1308(d).

4. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. *Conclusion.* Except as may be indicated by any issues specified below, the applicants (save for Group) are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications (save for Group's) ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Phoenix or Seven in which it is concluded the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1.1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the Group application (BPH-910925MC) IS HEREBY DISMISSED.

8. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Phoenix and Seven shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-184

In re Applications of

Alexander Snipe, Jr. d/b/a GLORY COMMUNICATIONS (hereafter "Glory") — File No. BPH-910228MC

VALENTINE COMMUNICATIONS, INC. (hereafter "Valentine") — File No. BPH-910228MD

William K. Durst and William L. Faircloth d/b/a LEXCO RADIO (hereafter "Lexco") — File No. BPH-910228MB (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 237A
in South Congaree, South Carolina

HEARING DESIGNATION ORDER

Adopted: August 5, 1992; Released: August 19, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Joint Settlement Agreement.* On February 4, 1992, Glory and Lexco filed a joint request for approval of settlement agreement, which they supplemented on February 25 and May 5, 1992. Under the terms of the agreement Lexco has agreed to dismiss its application. Separate and apart from Lexco's promise to dismiss is Glory's promise to reimburse Lexco for its legitimate and prudent expenses if Glory is ultimately awarded the construction permit. We have examined the agreement, including the accompanying declarations. Based upon this examination, we find that approval of the agreement would serve the public interest by eliminating a comparative applicant and thus simplifying the hearing, conserving the resources of the Commission and the applicants, and assisting the expeditious inauguration of a new FM broadcast service at South Congaree, South Carolina. We further find that none of the applications was filed for the purpose of reaching or carrying out the agreement, and that no consideration other than that detailed in the agreement has been directly or indirectly paid or promised. In addition, Lexco has certified and submitted documentation establishing that the consideration to be received ($9,734.63) will not exceed its legitimate and prudent expenses incurred in preparing, filing, and prosecuting its application. Accordingly, the applicants have complied with the provisions of 47 U.S.C. § 311(c)(3) and 47 C.F.R. § 73.3525. Since all the applicants propose to serve the same community, no § 307(b) questions have been presented and no publication is required. Therefore, we shall grant the joint request and approve the settlement agreement.

3. *Petition to Deny.* On November 19, 1991, Glory filed a petition to deny the Valentine application. A portion of Glory's petition is, in essence, a request for reconsideration of our October 2, 1991 action granting Valentine's petition for reconsideration and reinstating its application *nunc pro tunc*. In this regard, the reinstatement of the Valentine application was an interlocutory staff action and is thus not subject to reconsideration. *See* 47 C.F.R. § 1.106(a)(1). Accordingly, this portion of the petition will be dismissed. The remainder of the petition is essentially a petition to specify issues, which does not properly lie at the pre-designation stage and will therefore be dismissed. Nevertheless, Glory may raise this matter anew post-designation. *See Revised Processing of Broadcast Applications*, 72 FCC 2d 202, 213-15 (1979).[2]

4. *Divestiture.* Alexander Snipe, Jr., the sole principal of Glory, is also the General Sales Manager of WWDM(FM), Sumter, South Carolina. However, he has indicated his intent to terminate his relationship with WWDM(FM) in the event of grant of Glory's application. Accordingly, in the event of grant of Glory's application, Alexander Snipe, Jr. will be required to sever all connection with WWDM(FM) prior to the commencement of program test authority.

5. *Environmental.* Our engineering study based upon OST Bulletin No. 65, October, 1985 entitled "Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" reveals that Glory and Valentine did not address the matter of how it would protect workers on their respective towers from RF radiation exposure. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Glory and Valentine may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since Glory and Valentine failed to indicate

[1] On October 2, 1991, the Chief, Audio Services Division granted the petition for reconsideration filed May 6, 1991 by Valentine Communications, Inc. and reinstated its application *nunc pro tunc*.

[2] Also, we note that Glory's petition alleges that page 24, Section VII of Valentine's application, which contains both the public notice and tower site certifications, was missing. However, staff review reveals that page 24 was contained in the original application when filed.

how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, the applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65, *supra*, at 28. Accordingly, Glory and Valentine will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. *See* 47 C.F.R. § 1.1308(d).

6. *Amendment.* On October 24, 1991, Valentine filed a petition for leave to amend. We will grant the petition and accept the amendment pursuant to 47 C.F.R. § 1.65. Nevertheless, since the petition was filed after the expiration of the amendment-of-right period, no comparative upgrading will be permitted as a result of the amendment.

7. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. *Conclusion.* Except as may be indicated by any issues specified below, Glory and Valentine are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Glory or Valentine in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1.1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the joint request for approval of settlement agreement filed on February 4 (and supplemented on February 25 and May 5), 1992 by Glory and Lexco IS GRANTED; the settlement agreement IS APPROVED; and the application of Lexco IS DISMISSED.

11. IT IS FURTHER ORDERED, That the Glory "Petition to Deny or Dismiss" the Valentine application IS HEREBY DISMISSED, as indicated in paragraph 3.

12. IT IS FURTHER ORDERED, That in the event of the grant of Glory's application, Alexander Snipe, Jr. will be required to divest himself of all interests in and sever all connections with Station WWDM(FM) prior to the commencement of program test authority.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 5 hereinabove, Glory and Valentine shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

14. IT IS FURTHER ORDERED, That the petition for leave to amend filed on October 24, 1991 by Glory IS GRANTED, and the amendment ACCEPTED, to the extent indicated in paragraph 6.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-188

In re Applications of

STEPHEN W. SAMET (hereafter "Samet")	File No. BPH-910820MB
DORIS A. STUDSTILL (hereafter "Studstill")	File No. BPH-910820MC
FIRST ASSEMBLY OF GOD CHURCH (hereafter "Assembly")	File No. BPH-910821ME
Charles Tiemann d/b/a STARVED ROCK RADIO (hereafter "Radio")	File No. BPH-910822ME (DISMISSED HEREIN)

For Construction Permit for a New
Commercial FM Station on Channel 271A
at Oglesby, Illinois

HEARING DESIGNATION ORDER

Adopted: August 5, 1992; Released: August 19, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new commercial FM station.

2. *Hearing Fee.* Radio has not paid the hearing fee which was required by March 2, 1992, the date set forth in *Public Notice*, Mimeo No. 13110, released December 27, 1991. *See* revised Section 73.3573(g)(2) of the Commission's Rules and *Report and Order* in Gen. Dkt. 90-264 ("Proposals to Reform the Commission's Comparative Hearing Process"), 6 FCC Rcd 157, 157-158, 170 (1990), *Erratum*, 6 FCC Rcd 3472, *recon. granted in part*, 6 FCC Rcd 3403 (1991). Accordingly, the application of Radio will be dismissed.[1]

3. *Late-Filed Amendments.* Samet and Studstill petitioned for leave to amend their applications on November 25, 1991 and March 13, 1992, respectively. The accompanying amendments were filed after November 20, 1991, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. *Conclusion.* Except as may be indicated by any issues specified below, Samet, Studstill, and Assembly are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the application of Starved Rock Radio IS DISMISSED and the informal objection filed by Studstill on February 21, 1992 against the Starved Rock Radio application IS HEREBY DISMISSED AS MOOT.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Samet (11/25/91) and Studstill (3/13/92) ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extend indicated in paragraph 3.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

[1] In light of this action, the informal objection filed by Studstill on February 21, 1992 against the Radio application will be dismissed as moot.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-186

In re Applications of

KCBX, INC. File No. BPED-890619MH
(hereafter "KCBX")
Channel 207B
San Luis Obispo, California

LOGOS BROADCASTING CORPORATION File No. BPED-910219MJ
(hereafter "Logos")
Channel 207B
San Luis Obispo, California

For Construction Permit
for a New Noncommercial Educational FM Station

HEARING DESIGNATION ORDER

Adopted: August 5, 1992; Released: August 19, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM station.

2. *Financial.* KCBX answered "yes" to Item 1, Section III, Page 5 of FCC Form 340 which indicates whether the applicant is contingent upon receipt of a grant from the National Telecommunications and Information Administration (NTIA). During legal review, the staff discovered that KCBX had never applied for NTIA funding. Accordingly, a financial issue will be specified below.

3. *Late-filed Amendment.* The applicants below petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the "A" cut-off date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE FILED
1. KCBX	October 31, 1991
2. Logos	October 28, 1991

4. Neither of the applicants has indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time arrangement.

5. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to KCBX, whether the applicant is financially qualified.

2. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants, and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by KCBX and Logos ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date

of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-187

In re Applications of

FAMILY STATIONS, INC. File No. BPED-890815MC
(hereafter "Family")
Channel 215B1
Bakersfield, CA

SHEPHERD COMMUNICATIONS, INC. File No. BPED-891113ME
(hereafter "Shepherd")
Channel 215B
Shafter, CA

SKYRIDE UNLIMITED, INCORPORATED File No. BPED-901004MM
(hereafter "Skyride")
Channel 215B
Shafter, CA

For Construction Permit for a
New Noncommercial FM Station

HEARING DESIGNATION ORDER

Adopted: August 5, 1992; Released: August 19, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.

2. *Share-time Arrangement.* None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

3. *Section 307(b) and Contingent Comparative Issues.* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to 47 U.S.C. § 307(b), which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

4. *Late-Filed Amendments.* Family petitioned for leave to amend its application on December 23, 1991, after the last day for filing amendments as of right. The amendment, dealing with engineering, was filed in response to Commission correspondence. Accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2), the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from any of the above amendment will be disallowed.

5. *Comparative Coverage.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

6. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Family IS GRANTED, and the corresponding amendment (12/23/91) IS ACCEPTED to the extent indicated in paragraph 4.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-505

In re Applications of

ANDERSON BROADCASTING CO., LTD.	File No. BPH-880518MK
MINORITY BROADCAST DEVELOPMENT, INC.	File No. BPH-880519MO
BIRDSONG BROADCASTING	File No. BPH-880519MP
BELKIS J. LEZCANO	File No. BPH-880519NB
LINDA GILES	File No. BPH-880519NC
PRESS BROADCASTING COMPANY	File No. BPH-880519NK
TICECOMM, INC.	File No. BPH-880519NY

For Construction Permit for a
New FM Station on Channel 229A
in Tice, Florida

Appearances

Michael J. Wilhelm on behalf of Anderson Broadcasting Co., Ltd., *John F. Garziglia* on behalf of Minority Broadcast Development, Inc., *W. Ray Fitch* on behalf of Birdsong Broadcasting, *Henry A. Solomon* on behalf of Belkis J. Lezcano, *J. Richard Carr* on behalf of Linda Giles, *Richard F. Swift* on behalf of Press Broadcasting Company, *Shelley Sadowsky* on behalf of TiceComm, Inc., and *Larry A. Miller* on behalf of the Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH P. GONZALEZ

Issued: August 12, 1992; Released: August 20, 1992

PRELIMINARY STATEMENT

1. The parties to this proceeding seek approval of several settlement agreements which would remove the mutually exclusivity of the applications, by permitting a grant of the surviving entity's application and the dismissal of the remaining applications. However, before the merits of the various settlement agreements can be considered, several preliminary matters must be addressed. As noted below, there is currently a qualifying issue pending against a principal of an applicant to be merged into the surviving entity which must be addressed before action can be taken on the joint request, as well as several motions to enlarge the issues which are still pertinent. These matters will be handled below.

Minority's Qualifying Issue

2. The *Hearing Designation Order* (H.D.O.) released in this proceeding on December 10, 1990, designated the following issue against the application of Minority Broadcast Development, Inc. (Minority):

> To determine (a) whether 105.3 Ltd.'s principal, Darie D. Hamilton, withheld information and answered questions untruthfully during discovery in the Solana, Florida proceeding (MM Docket No. 464, (b) whether 105.3 Ltd. avoided compliance with the reporting requirements, and (c) from the evidence adduced pursuant to Issues 5(a) and 5(b) above, whether Minority possesses the basic qualifications to be a licensee of the facilities sought herein.

The issues, set forth above, which were designated by the Judge in the Solana, Florida proceeding remained unresolved in that proceeding because 105.3 Ltd. dismissed its application pursuant to a settlement. Darie D. Hamilton, the sole general partner of 105.3 Ltd., is also a principal in Minority, and the Commission, therefore, specified the 105.3 Ltd. issues against the Minority application in this proceeding.

3. Because the settlement agreements filed in this proceeding contemplate a merger of three of the applicants, including Minority which would receive a 7 percent interest in the merged entity, resolution of the 105.3 Ltd. issues favorably to Minority is a condition precedent to approval of the settlement agreements. With this in mind, the Presiding Judge ordered Minority to submit Proposed Findings of Fact and Conclusions of Law with respect to these issues, and any party to this proceeding desiring to do so was given leave to reply to these Proposed Findings. Minority filed its Proposed Findings on May 13, 1992, and the Mass Media Bureau's Comments on the Proposed Findings were filed on May 29, 1992.

4. In its Findings, Minority sets forth the facts which resulted in the designation of the misrepresentation/lack of candor and reporting issues against Ms. Hamilton in the Solano, Florida proceeding. The Bureau indicates in its comments that it has reviewed Minority's statement of the facts and believes that it accurately reflects the record developed in the Solano, Florida proceeding with certain exceptions, and it adopts those findings, as supplemented in its comments.

5. The misrepresentation/lack of candor issues, set forth above, were designated against 105.3 Ltd. based on Ms. Hamilton's answers at deposition held on March 16, 1988 with respect to any involvement on her part in a business run by her mother, and any problems she may have had with the government of the State of Florida: questions to which, Ms. Hamilton answered no (Tr. 16, and 24). Questions were also raised as to the truthfulness of Ms. Hamilton's testimony as to the role of her limited partners in the prosecution of the 105.3 Ltd. application. In addition, a Section 1.65 issue was designated against 105.3 Ltd. because of Ms. Hamilton's failure to advise the Commis-

sion of an arrangement whereby a limited partner in the 105.3 Ltd. Partnership refunded some of a former limited partner's financial investment in 105.3 Ltd.

6. Ms. Hamilton lent her mother some money to start a business, and, on occasion, gave her advice with respect to managing the business (Tr. 340, and 344-348). She was not, however, an owner or an employee of her mother's business, despite a public notice published by Ms. Hamilton's mother which listed her as a co-owner (105.3 Ltd. Ex. #11, p. 2; 105.3 Ltd. Ex. #12, p. 1). Ms. Hamilton testified that she was not consulted about the language in the public notice, prior to its being published, and was unaware of it at her deposition (Tr. 363, and 371). Ms. Hamilton marginal involvement in her mother's business would in no way have compromised her integration commitment in the Solano, Florida proceeding. Ms. Hamilton, therefore, lacked a motive for concealing this limited involvement. The most likely explanation for her denial that she was involved in any way in her mother's business was her honest belief that the assistance she had given to her mother, in the past, was not an actual "involvement" in the business (Tr. 353). Whatever discrepancy exists, therefore, between the facts as established and Ms. Hamilton's testimony appears to be *de minimis*, which, absent a showing of a deliberate attempt on Ms. Hamilton's part to mislead, is found to be of no consequence. The record, in fact, demonstrates the very opposite. Ms. Hamilton sought shortly after her deposition to correct the transcript of her deposition by disclosing to the Commission the loan to her mother (Tr. 356); a disclosure that was made before the filing of the request for the designation of a misrepresentation/lack of candor issue in the Solano, Florida proceeding. Similarly, Ms. Hamilton's failure to recall an administrative fine imposed upon her in 1985 by the State of Florida is, under the facts set forth, understandable, and it does not rise to the level of a deliberate misrepresentation or lack of candor which would warrant her disqualification. Ms. Hamilton testified that the matter regarding the fine simply did not come to mind (105.3 Ltd. Ex. #13, p. 1). The record establishes that the fine in question was already several years old. In addition, the amount of the fine was paid by someone other than Ms. Hamilton (Tr. 464), and although the fine was levied against her, she at the time and still does not believe that the failure to comply with a State of Florida regulation was her fault. Both factors, when combined, form a credible basis for her contention that she, at deposition, simply did not recall either the imposition of the fine or its payment. This conclusion is given further weight by the fact that Ms. Hamilton lacked a motive for concealing this information since the imposition and payment of the fine would have had no comparative impact on her standing in the Solano, Florida proceeding. The Presiding Judge concludes, therefore, that sufficient cause has not been shown for disqualifying Minority on the basis of these minor discrepancies in her deposition testimony.

7. The record further demonstrates that Ms. Hamilton spoke truthfully when she described the lack of any involvement of her limited partners in the activities of 105.3 Ltd. partnership. Although Ms. Hamilton spoke with the limited partners over the phone, the primary purpose of these calls, according to the evidence of record, was to discuss the financial obligations of the partnership (Tr. 475-76). The minor involvement of one of the limited partners in the partnership's affairs, of which Ms. Hamilton was unaware, could not have been, for that very reason, deliberately concealed. In any case, the involvement was minimal, at best incidental and was initiated by someone other than the limited partner of 105.3 Ltd. (CBP Ex. #13, pp. 61-62). There is nothing in the record to indicate that the limited partners of 105.3 Ltd. exercised any control over the applicant. Similarly, Ms. Hamilton's failure to report that a former limited partner of 105.3 Ltd. still had a possible financial interest in the partnership is understandable, since she, apparently, had no knowledge of this private arrangement between the former limited partner and the successor to his interest (CBP Ex. #12, 6; Tr. 93, and 95-97). Even assuming that this "interest" had to be reported, Ms. Hamilton's failure to report this interest, standing alone, would not warrant Minority's disqualification.

8. The Presiding Judge concludes, therefore, that Ms. Hamilton attempted at her deposition to answer all questions truthfully[1] and did not deliberately withhold information from the Commission in the Solano, Florida proceeding. What information, on further reflection, was found to be inaccurate or incomplete, was corrected by Ms. Hamilton after the taking of her deposition, and before any party sought a misrepresentation/lack of candor issue. Absent, as is the case here, of any evidence of a deliberate attempt, on Ms. Hamilton's part, to mislead or conceal, a finding in her favor on these issues is warranted. *So ordered.*

Motion to Enlarge Issues Against TiceComm, Inc.

9. Minority requests that the issues in this proceeding be enlarged to include the following:

> (1) To determine whether Mitchell Rubenstein is an undisclosed real-party-in-interest in TiceComm's application, and if so, whether TiceComm has the requisite character qualifications to be a Commission licensee;
>
> (2) To determine whether TiceComm is financially qualified; and
>
> (3) To determine whether TiceComm has, or ever had, reasonable assurance of the availability of its antenna site.

10. Movant has failed to make a *prima facie* case that Mr. Rubenstein is the moving force behind TiceComm's application. Although Mr. Rubenstein performed certain tasks in furthering the TiceComm application, they were done at the behest of Ms. Adams, the voting shareholder, and in his role as corporate attorney for TiceComm. Ms. Adams' contention that Mr. Rubenstein acted at all times pursuant to her directions and with her authorization has not been refuted. Accordingly, the request for a real party-in-interest issue will be denied.

11. Similarly, movant has failed to show that the designation of a financial qualifications issue against TiceComm is warranted. The request is based on a statement by the trustee of the several trusts holding non-voting stock in TiceComm that he did not know whether or how, as non-voting shareholders, the trusts would be able to give the personal, unlimited and unconditional guarantee required of owners by TiceComm's loan commitment letter. TiceComm submitted, as part of its opposition statement, the legal opinion of a Florida trust lawyer which indicates that under the terms of the trusts in question, the trustee would be authorized to guarantee the

proposed loans from the lending institution. The Presiding Judge finds, therefore, that Minority has failed to show any basis for designating a financial qualifications issue against TiceComm.

12. Finally, good cause has not been shown for designating an antenna site availability issue. TiceComm has submitted, attached to its opposition statement, a "Letter of Intent" to lease a four acre site from Dewey Boyd, and a May 17, 1988 "Site Assignment Letter" assigning the May 16, 1988, lease right to TiceComm as well as affidavits from individuals who actually negotiated with Mr. Boyd on the antenna site lease. This material appears to demonstrate that Mr. Boyd, in his September 10, 1991 affidavit which denies such an arrangement, apparently forgot his prior commitment to lease his property. It is abundantly clear, therefore, that at the time TiceComm executed its application it had a reasonable assurance of the availability of a transmitter site. Although the transmitter site appears to be no longer available, TiceComm proposes to merge with Anderson and Minority, and the merged entity will use Anderson's transmitter site. No site availability issue will, therefore, be specified.

13. Accordingly, the Presiding Judge concludes that Movant has failed to demonstrate that any one of the requested issues should be designated against TiceComm, and the motion will be denied in its entirety.

Second Motion to Enlarge Issues Against TiceComm Filed by Minority

14. Minority requests that a financial qualifications/false financial certification issue be designated against the application of TiceComm. It notes that TiceComm's financing letter from Sunbank of Miami requires the "[p]ersonal unlimited, unconditional guaranty of owners" and that Barry S. Fishman, a TiceComm non-voting stockholder, indicated, during the course of his deposition, that he would not provide such a guarantee. Minority submits that his testimony raises questions as to whether or not financing will be available to TiceComm. With respect to the letter itself, Minority argues that it is a mere accommodation, based on past business dealings between the bank and TiceComm's local counsel and Mr. Fishman: an argument, it believes, given added weight by the fact that Mr. Fishman was not required to supply any personal financial information to the bank.

15. The bank states, in its letter, that it is being executed based on its knowledge of the guarantor/owners, and that it has in the past, financed startup broadcast stations, including a television station in which several of the same TiceComm investors have been involved. The fact that Mr. Fishman did not supply the bank with a personal financial statement appears, therefore, to be of no consequence since the bank has present knowledge of the investors' credit worthiness which would justify issuing the financing letter. In any case, Mr. Fishman's failure to submit a personal guarantee to the financing bank does not raise any questions as to TiceComm's financial qualifications, since he intends to meet his *pro rata* share of the costs in cash.

16. Accordingly, the Presiding Judge finds that Minority has failed to make a *prima facie* showing that TiceComm falsely certified its financial qualifications, or that it is not financially qualified. The second motion filed by Minority will be denied.

Minority's Motion to Enlarge Issues Against Anderson Broadcasting Co., Ltd.

17. Minority seeks the specification of the following issues:

> (1) To determine the legal qualifications of Anderson Broadcasting Co., Ltd.
>
> (2) To determine whether Anderson Broadcasting Co. Ltd. misrepresented its legal qualifications to the Commission, and if so, the effect thereof on its basic qualifications to be a Commission licensee.
>
> (3) To determine whether Anderson Broadcasting Co., Ltd. violated Section 1.65 of the Rules by failing to report the revocation and subsequent reinstatement of its authority to transact business in the State of Florida; and, if so, the effect thereof on its basic qualifications to be a Commission licensee.
>
> (4) To determine whether Anderson has maintained its local public inspection file in accordance with the requirements of 73.3526(a) of the Rules; and, if not, to determine whether Anderson has the basic qualifications to be a Commission licensee.
>
> (5) To determine whether Anderson Ltd. failed to establish the local public inspection file required under Rule Section 73.3526(a).
>
> (6) To determine whether Anderson Ltd. falsely certified that it complied with the Rule Section 73.3580; and if so, whether Anderson possesses the basic qualifications to be a Commission licensee.
>
> (7) To determine whether Anderson Broadcasting Co., Ltd. has abused the Commission's discovery processes, and if so, the effect thereof on its basic qualifications to be a Commission licensee.
>
> (8) To determine the facts and circumstances surrounding the certification of Anderson Ltd.'s financial qualifications; whether such certification was false; and if so, the effect thereof on its basic qualifications to be a Commission licensee.

18. Minority seeks the designation of a legal qualifications issue against Anderson on the basis that it did not file a fully executed certificate of limited partnership with the State of Florida until five months after the filing of its application with this Commission; and that Anderson was not, therefore, legally qualified at the time it submitted its application. Minority argues, therefore, that Anderson's claim to the Commission that it was a limited partnership constituted a misrepresentation at the time it was made. It also seeks a §1.65 issue because of Anderson's failure to notify the Commission that its authority to transact business in the State of Florida was revoked for a period of time in 1989.

19. Anderson concedes the above facts. However, it states that its failure to comply in a timely fashion with the laws of the State of Florida does not, under the circumstances present here, warrant its disqualification, arguing that its statement to the Commission that it was a limited partnership was not a misrepresentation since it comports with the applicant's behavior at that time. The Presiding Judge concludes that Anderson's lack of legal status, under Florida law at the time it filed its application, is irrelevant since there has been no showing that it represented itself at any time or acted in any manner other than

as a limited partnership. As to Anderson's temporary lapse in legal status and its failure to report the same, even if we assume that Anderson was required to report this event under Section 1.65 of the Commission's Rules, such a minor omission would not warrant its disqualification. No purpose would, therefore, be served in designating a §1.65 issue.

20. With respect to Minority's request for the designation of public inspection file issues, Anderson states that it did in fact establish a public inspection file, contrary to Minority's contention. A second statement from the manager of the center, where Anderson's public inspection file is kept, submitted as part of its opposition statement, supports this claim. Anderson's failure to put two amendments in the file, an omission conceded by Anderson, was, apparently, inadvertent, and it would not warrant its disqualification.

21. Similarly, the Presiding Judge does not find good cause for designating an abuse of process issue. There was, it appears, a difference of opinion between the parties as to what documents were to be produced pursuant to discovery. Minority has not shown that it has been prejudiced in its ability to conduct discovery by Anderson's failure to produce certain documents, nor has it shown that Anderson deliberately sought to conceal significant documents from discovery. No disqualifying issue is, therefore, warranted.

22. Minority's request for a false financial certification issue will also be denied. Anderson's limited partners' testimony at deposition that they were not asked to provide personal guarantees to the financing institution is of no significance, since the bank letter in question does not require guarantees from the limited partners, and such guarantees were not apparently, prerequisites for the issuance of the loan. The limited partners' failure to provide such guarantees does not, therefore, raise questions as to the truthfulness of Anderson's financial certification. The request for financial certification issue will also be denied.

23. The Presiding Judge finds that Minority has failed to demonstrate that further inquiry pursuant to any one of the sought issues is required. Accordingly, the motion will be denied in its entirety.

Joint Request for Approval of Settlement Agreement

24. Anderson, Minority, Birdsong Broadcasting (Birdsong), Belkis J. Lezcano (Lezcano), Linda Giles (Giles), Press Broadcasting Company (Press), and TiceComm request approval of settlement agreements which provide, in pertinent part, for the merger of Anderson, TiceComm and Minority's interests by forming a new entity Gulf Communications Partnership (Gulf), a Florida general partnership, in which Anderson and TiceComm will each hold a 46.5 percent general partnership interest, and Minority will hold a 7 percent general partnership interest; that Anderson's application will be amended to substitute Gulf Communications Partnership as applicant; that Minority and TiceComm's applications will be dismissed with prejudice; and that the applications of Birdsong, Lezcano, Giles, and Press will also be dismissed with prejudice in return for reimbursement in the amount of $19,600 to Birdsong, $23,250 to Lezcano, $50,000 to Giles, and $15,000 to Press of their legitimate and prudent expenses incurred in prosecuting their applications.

25. The parties to the various agreements are in substantial compliance with the requirements of Section 73.3525 of the Commission's Rules. In addition, they declare that their respective applications were not filed for the purpose of reaching or carrying out these settlement agreements, and that the reimbursed parties have shown legitimate and prudent expenses in excess of their requested amounts. The Presiding Judge further finds that a grant of the joint request would serve the public interest, since it would expedite the provision of a new FM service to Tice, Florida; and that the merger appears *bona fide* with an appropriate allocation of economic risks and rewards among the merging parties. Accordingly, the joint request will be granted.

Petition for Leave to Amend

26. Anderson, in furtherance of the settlement agreements approved above, seeks leave to amend its application to reflect a change in its business form from a limited partnership to a partnership, to change the name of the applicant to Gulf Communications Partnership, and to integrate Minority and TiceComm as equity owners of the applicant. For good cause shown, the petition will be granted and the amendment accepted.

RULINGS

IT IS ORDERED that the Motion to Enlarge Issues Against TiceComm, Inc. filed by Minority Broadcast Development, Inc. on September 13, 1991 IS DENIED.

IT IS FURTHER ORDERED that the Second Motion to Enlarge Issues Against TiceComm, Inc. filed by Minority Broadcast Development, Inc. on October 7, 1991 IS DENIED.

IT IS FURTHER ORDERED that the Motion to Enlarge Issues Against Anderson Broadcasting Co., Ltd., as supplemented, filed by Minority Broadcast Development, Inc. on September 13, 1991 IS DENIED.

And IT IS FURTHER ORDERED that the Joint Request for Approval of Agreements filed jointly by Anderson Broadcasting Co., Ltd., Minority Broadcast Development, Inc., Birdsong Broadcasting, Belkis J. Lezcano, Linda Giles, Press Broadcasting Company, and TiceComm, Inc. on March 27, 1992, as supplemented on April 2, 1992 and April 16, 1992 IS GRANTED, and the settlement agreements ARE APPROVED; that the Anderson Broadcasting Co., Ltd. Petition for Leave to Amend so as to Implement Settlement Agreement filed by Anderson Broadcasting Co., Ltd. on June 17, 1992 IS GRANTED, and the amendments ARE RECEIVED; that the applications of Minority Broadcast Development, Inc. (File No. BPH-880519MO), Birdsong Broadcasting (File No. BPH-880519MP), Belkis J. Lezcano (File No. BPH-880519NB), Linda Giles (File No. BPH-880519NC), Press Broadcasting Company (File No. BPH-880519NK), and TiceComm, Inc. (File No. BPH-880519NY) ARE DISMISSED with prejudice; and that the application of Gulf Communications Partnership (formerly Anderson Broadcasting Co., Ltd.) for a construction permit for a new FM station on channel 229A (93.7 MHz) in Tice, Florida (File No. BPH-880518MK) IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] The additional discrepancies noted by the Bureau in its Reply, namely information as to the amount of time that Ms. Hamilton attended the University of Georgia and her failure to disclose her temporary relocation for three weeks while her house was being completed are of no consequence.

[2] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application

For License Renewal of Station KBIL-FM[1] San Angelo, Texas — File No. BRH-900402B9

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1992; Released: August 20, 1992

By the Commission:

I. INTRODUCTION

1. Pending before the Commission is the application for renewal of the license of KBIL-FM, San Angelo, Texas and an application to assign the license from Robert Call, Receiver, to Regency Broadcasting, Inc. On July 2, 1990, the Texas State Conference of Branches of the NAACP filed a Petition to Deny against the renewal application. The San Angelo Branch of the NAACP joined as a party to the petition on August 6, 1990. The Petition alleges that the station violated the Commission's EEO Rules and policies. Upon review of the NAACP's arguments, the licensee's renewal application and response to Commission inquiry, we conclude that the station violated the Commission's EEO Rule, 47 C.F.R. Section 73.2080. Accordingly, we grant the renewal application of KBIL-FM subject to reporting conditions to monitor future EEO compliance. In addition, we grant the licensee's application to assign the license of KBIL-FM.

II. PROCEDURAL MATTERS

2. In challenging an application pursuant to 309(d) of the Communications Act, as amended, 47 U.S.C. 309(d), a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with (the public interest, convenience, and necessity)." 47 U.S.C. 309(d); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. 309(d)(1).

3. Although its petition was timely, the NAACP filed an untimely declaration from the President of the San Angelo Branch of the NAACP in which he stated that he was a regular listener to the station. The NAACP states that the declaration was untimely due to its severe shortage of resources and large backlog of cases. However, we do not find that the NAACP's reasons justify its late filing. As we stated in *Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988), we will not acquiesce to the petitioners' submission of late filings for insubstantial reasons. Accordingly, pursuant to Section 73.3584(a), 47 C.F.R. Section 73.3584(a), we will consider the NAACP an informal objector against KBIL-FM.

III. DISCUSSION

4. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080(b) and (c).

5. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*petition for reconsideration pending*); *see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters) (*NAB Report and Order*). *See e.g. Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

6. The NAACP derived its factual allegations from the station's EEO program and annual employment reports. Review of the licensee's EEO records led us to conclude that the NAACP presented a *prima facie* case demonstrating that unconditional grant of the application for renewal would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1); *Astroline*, *supra*. Further inquiry was therefore necessary. *See Beaumont*, *supra*; *Bilingual*, *supra*.

7. After subsequent review of the licensee's renewal application, inquiry responses and NAACP's arguments, we find no evidence of discrimination and no substantial and material questions of fact requiring a hearing. In particular, the licensee did attract and hire minority applicants. Thus, grant of the application will serve the public interest. 47 U.S.C. Section 309(d)(1); *Astroline*, *supra*. However, our evaluation reveals a record of inadequate EEO efforts. Accordingly, we will grant renewal but with remedies as described below.[2]

8. Review of the licensee's renewal application and response to our inquiry indicates that the licensee had 30 hiring opportunities, including 27 upper-level, during the period March 1, 1987, through March 1, 1990.[3] Nine of these positions were filled during the reporting year, *i.e* the 12-month period prior to submitting the EEO program to the Commission. The general recruitment sources

contacted by the licensee for the above nine openings and the number of minority referrals from each source are: the *Standard Times* (0), the *Midland Reporter* (0), American Commercial College (0), the Texas Employment Commission (0), employees (0), San Angelo State University (3) and radio ads (0). During the license term, other sources were contacted, including Chenier Business School, Concho Career Institute, Snelling and Snelling Employment Agency and Evans Personnel. The licensee does not state how many minority referrals, if any, it received from these sources. The licensee reported in response to our inquiry that minorities were in the applicant pools for 20 of the 30 positions and in the interviewee pools for 18 of the 30 positions. Forty-three of the 183 applicants (23%) and 23 of the 115 interviewees (20%) for the positions were minorities. The licensee hired two minorities including one for an upper-level position from March 1, 1987, through March 1, 1990.

9. The NAACP argues that the EEO program included in KBIL-FM's renewal application "contained every *Bilingual* indication of EEO program failure." The NAACP states that the program contained no minority organizations, minority media or minority schools as recruitment sources and listed only three minority referrals during the reporting year. In addition, the NAACP states that none of the 14 upper-level hires at the station were minority. The NAACP contends that the licensee did not address these problems nor propose any corrective measures despite these shortcomings. Thus, the NAACP argues that a hearing is necessary to determine whether the station's questionable EEO program, combined with the station's failure to employ more than a token number of minorities during the license term, indicate a deliberate violation of the EEO Rule or discrimination.

10. In response to the NAACP's arguments, the licensee states that it has a good record of hiring and employing minorities. In its inquiry response, the licensee indicates that it hired a minority for an upper-level position during the period under review, March 1, 1987, through March 1, 1990. However, it also states that it will endeavor to do more to attract minority applicants when a position becomes available, including contacting the NAACP and the League of United Latin American Citizens.

11. We conclude that the station's EEO record does not raise substantial and material questions of fact sufficient to warrant a hearing. In addition, we find no evidence of discrimination by the licensee. In particular, the licensee did attract and hire minorities for full-time positions, including one upper-level hire.

12. However, we find KBIL-FM's record to be similar to that of Station WFBR(FM) in *The Baltimore Radio Show, Inc.*, 3 FCC Rcd 5913 (1988). In that case, we found that the licensee failed to analyze its stations' efforts to recruit and hire minorities despite employing few Blacks on its staff when compared to the available Black labor force of 22.2%. Accordingly, we imposed reporting conditions to monitor the stations' future EEO performance.

13. Similarly, the licensee in the instant case failed to analyze its station's efforts to recruit and hire minorities despite employing few Hispanics on its staff compared to the available Hispanic labor force of 19.6%. The licensee's records with respect to the number of minority referrals it received are incomplete,[4] and what information is available reveals that the licensee did not take steps to change its recruitment sources even though those sources had not proven very productive. Moreover, although the licensee reported a significant number of minority applicants and interviewees, it hired only two minorities despite a minority labor force of nearly 20%. These facts further underscore the need for the licensee to engage in meaningful self-assessment to ensure that its efforts to recruit and employ qualified minorities are effective. Accordingly, while we find that grant of the application will serve the public interest, we also find it appropriate to impose reporting conditions on KBIL-FM to monitor its future EEO performance.

14. We note that KBIL-FM suspended operations in September 1990 due to financial distress and has employed no staff since that time.[5] We also note that the application for involuntary assignment of the license of KBIL-FM from Triangle Texas Media, Inc. to Robert Call, Receiver, was granted on October 29, 1991, and that an application is pending with the Commission requesting assignment of the license of KBIL-FM from Robert Call, Receiver, to Regency Broadcasting, Inc. Upon resumption of operation of KBIL-FM, the current licensee or assignee, if an assignment has occurred, must fulfill the reporting conditions requirement.

IV. CONCLUSION

15. Based on the foregoing, we conclude that the licensee of KBIL-FM violated the Commission's EEO Rule but find no evidence of discrimination or any substantial and material question of fact to warrant a hearing. Accordingly, we will grant the renewal and assignment applications of KBIL-FM subject to conditions described herein.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the petition to deny filed by the Texas State Conference of Branches of the NAACP and the San Angelo Branch of the NAACP IS DISMISSED and when considered as an informal objection IS DENIED.

17. IT IS FURTHER ORDERED that the renewal application of KBIL-FM and the application to assign the license of KBIL-FM from Robert Call, Receiver, to Regency Broadcasting, Inc. ARE GRANTED subject to reporting conditions as described herein and to the following additional conditions:

(a) That the assignment of license covered by BALH-910729HY will be consummated within sixty (60) days of the date of the grant; that the Commission will be notified of such consummation within one day thereafter; that the station will resume broadcasting within sixty (60) days after consummation of the grant of the assignment application; that the Commission will be notified of the resumption of broadcasting within one day thereafter; and failure to consummate will render the grant of the renewal application null and void, and will cause the renewal application to revert to pending status.

(b) Prior to the resumption of broadcasting an evaluation of the RF radiation situation at the transmitter site must be submitted, establishing that there will not be a significant environmental impact from RF radiation and that the station complies with the "Radio Frequency Guides" adopted by the American National Standards Institute (ANSI C95.1-1982).

18. IT IS FURTHER ORDERED that the licensee of KBIL-FM submit to the Commission an original and one copy of the following information on April 1, 1993, April 1, 1994 and April 1, 1995:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full-time or part-time status of the position, the race or national origin, sex, and the referral source of each applicant for each job, and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[6]

(b) A list of employees as of the March 1, 1993 payroll period for the first report and as of the March 1, 1994, and March 1, 1995, payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the stations' efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

19. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the licensee have any questions regarding this action or require further information concerning the employment reports, it may call the Mass Media Bureau's EEO Branch at (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] KBIL (AM), owned by Hoss Media, Inc., went silent without Commission approval. Hoss Media, Inc. did not respond to a Commission inquiry, dated April 23, 1992, requesting information on the station's plans to return to the air. By letter dated June 10, 1992, the Commission terminated the licensee's authority to operate and deleted the station's call letters.

[2] As is our practice in all cases, we reviewed the licensee's EEO efforts towards both women and minorities. We find the licensee's record of recruiting women to be sufficient.

[3] The San Angelo, Texas Metropolitan Statistical Area is 24.1% minority (19.6% Hispanic, 3.6% Black, .5% Asian and .4% American Indian). The licensee took control of KBIL-FM on November 30, 1983. The station's 1990 Annual Employment Report lists one Hispanic on an overall staff of 13 (7.7%) and on an upper-level staff of 10 (10%). No minorities were employed in 1985, 1986, 1988 and 1989 on overall staffs of 15, 19, 14 and 13, respectively. In 1987, the station employed four minorities (two Asians, one Black and one Hispanic) on an overall staff of 17 (23.5%) and three minorities (two Asians and one Hispanic) on an upper-level staff of 15 (21.4%). In 1984, Station KBIL-FM employed one Hispanic on an overall staff of 15 (6.7%).

[4] There is no record before us of minority referrals received by the licensee outside the reporting year. However, we remind licensees that such records are necessary for meaningful self-assessment of an EEO program. *See NAB Report and Order, supra*. We note that the licensee in this case is required by the reporting conditions imposed herein to identify the race or national origin and gender of all applicants as well as their referral source.

[5] Presently, KBIL-FM has permission from the Commission to remain silent through October 17, 1992.

[6] Such a list might start: (1) News Director; Officials and Managers; Full-time

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP
Selected: Black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

EAGLE 22, LTD.
(Assignor)

and File No. BAPCT-910325KF

CHASE COMMUNICATIONS
CORPORATION
(Assignee)

For Assignment of Construction
Permit for Channel 22,
Fort Collins, Colorado

CHASE File No. BMPCT-910326KF
COMMUNICATIONS
CORPORATION

For Modification of
Construction Permit for
Channel 22, Fort Collins, Colorado

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 1992; Released: August 19, 1992

By the Commission:

1. The Commission has before it for consideration an application for consent to assign the construction permit for unbuilt UHF television station Channel 22, Fort Collins, Colorado, from Eagle 22, Ltd. (Eagle) to Chase Communications Corporation (Chase). Chase is the parent company of the licensee of television station KDVR, Channel 31 (Fox), in Denver, Colorado, and the acquisition of the construction permit for Fort Collins will result in the overlap of the predicted Grade B contour of the proposed Fort Collins station with that of commonly owned KDVR. Thus, Chase proposes to operate Channel 22 as a "satellite" of KDVR pursuant to the satellite exception provision contained in Note 5 of the Commission's multiple ownership rule for television stations, Section 73.3555(a)(3).[1] This assignment application is also contingent upon our grant of the application for modification of the construction permit, concurrently filed by Chase. WGN of Colorado, Inc. (WGN), licensee of station KWGN-TV, Channel 2 (Ind.) in Denver, filed a petition to deny the assignment and filed an informal objection against the modification.

BACKGROUND

2. On February 18, 1983, Eagle, then known as Channel 22 of Fort Collins Associates,[2] filed an application for a construction permit to build a new television station on Channel 22 at Fort Collins. It proposed a full-service station, operating at 5,000 kW effective radiated power (ERP), from a site near Fort Collins, at Horsetooth Mountain, with a tower height 429 meters above average terrain. Eagle was awarded the construction permit in a comparative proceeding in November 1985. After administrative and judicial appeals, the grant of Eagle's construction permit became final in 1988.[3] By this time, according to Eagle, the economic situation, programming availability and prospects for a UHF full-service station had faltered since 1983, when Eagle first applied for the construction permit. Thus, Eagle decided that due to these changed circumstances it could no longer construct a stand-alone station. After considering several inquiries by potential buyers and one other offer involving no cash, Eagle entered into a purchase agreement in January 1991 with Chase, which proposes to operate Channel 22 as a satellite of KDVR in Denver. Chase also seeks, as a condition of the assignment, consent to modify the construction permit to reduce the tower height to 318 meters and to move the transmitter site about 6.3 miles northwest of the authorized location at Horsetooth Mountain while maintaining the originally authorized ERP of 5000kW.[4] This change in facilities would reduce the area receiving service from both stations and would eliminate the predicted overlap of the City Grade contours of KDVR and Channel 22 as presently authorized.

3. WGN raises three principal arguments against grant of the assignment and modification applications: (1) that the modification sought by Chase, which will eliminate the overlap of the City Grade contours of Channel 22 and KDVR, would substantially reduce the service area from that originally authorized for Channel 22; (2) that the hearing requirement of Section 73.3597(a) of the Commission's Rules applies to the assignment of Channel 22; and (3) that the applicants have not demonstrated that they qualify for the public interest presumption pursuant to the Commission's policy regarding television satellite applications.

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[1] Section 73.3555(a)(3) generally prohibits common ownership of television stations when the Grade B contour of one overlaps that of the other. Note 5 to this section, however, permits common ownership when the Commission has determined that operation of one station as a satellite is in the public interest.

[2] Channel 22 of Fort Collins Associates filed an amendment to its application on April 4, 1983, changing its name to Eagle 22, Ltd.

[3] *See Fort Collins Telecasters*, 103 F.C.C. 2d 978 (Rev. Bd. 1986), *review denied*, 2 F.C.C. Rcd 2780 (1987), *aff'd per curiam*, 841 F.2d 428 (D.C. Cir. 1988).

[4] Chase's modification application, BMPCT-910326KF, has been amended twice, most recently in conjunction with its December 16, 1991 supplemental submission. The first amendment, filed May 31, 1991, was to correct a minor error in the tower location, and the second amendment is to relocate the transmitter site, to the northwest and away from Denver, due to the unavailability of the formerly proposed site and to the objections of local entities.

DISCUSSION

The Modification Application

4. WGN argues that Chase seeks to modify the Channel 22 construction permit in order to eliminate the overlap of the City Grade contours of KDVR and the Channel 22 permit as presently authorized, so that it can meet our standards for reviewing requests for operation as a satellite station.[5] If granted, WGN contends, the modification would substantially reduce the service area from that originally authorized, thereby resulting in an inefficient use of the spectrum. It observes that the authorized Grade B contour of Channel 22 encompasses an area of 22,914 square kilometers and a population of 1,498,010, while the proposed Grade B contour would encompass only 16,157 square kilometers and a population of 360,123. WGN asserts that this abridgement would "waste" a full-service television allotment as well as dispossess more than one million persons of Channel 22's service. Accordingly, WGN requests that the Commission defer action on the proposed modification until the assignment application is processed or, in the alternative, dismiss the modification.

5. We will reject WGN's requests. Initially, we observe that Section 73.3517 of our rules permits us to consider modification applications filed by proposed buyers, unless the processing of such applications would be contrary to "sound administrative practice." Because we believe that grant of the modification application here will aid in expediting service to the public, we believe consideration of the modification application is consistent with "sound administrative practice." *See, e.g., Hector Nicolau*, 5 F.C.C. Rcd 6370 (1990); *John McCutcheon d/b/a MCC Communications*, 4 F.C.C. Rcd 2079 (1989). Thus, we will examine the modification application and the proposed service losses to determine if they comport with the public interest.

6. Although any loss of service is *prima facie* inconsistent with the public interest, it is our policy to consider and evaluate any counterbalancing factors an applicant may present to justify service losses. *Hall v. F.C.C.*, 237 F.2d 567, 572 (D.C. Cir. 1956). This balancing process, to determine whether the projected loss of service will be outweighed by other factors, involves more than a mere comparison of numbers. *West Michigan Telecasters, Inc.*, 22 F.C.C. 2d 943 (1970), *recon. denied*, 26 F.C.C. 2d 668 (1970), *aff'd* 460 F.2d 883 (D.C. Cir. 1972). Because Channel 22 is unbuilt and has never actually provided service, any "loss" of service resulting from the modification is based only on potential, not existing, service. Consequently, we have greater flexibility in determining whether a proposed modification serves the public interest. *John McCutcheon*, 4 F.C.C. Rcd at 2082.

7. We find that the proposed facility would still be substantial, albeit less than initially authorized, because it would operate from a height of 318 meters and with a maximum allowable ERP of 5000kW. This is not an inefficient use of the spectrum, and apparently offers the only likely possibility of Channel 22 becoming operational. Moreover, at least 60 percent of the population in the loss area is located south of Fort Collins, toward Denver, and lies within the Grade B contours of between five and 17 full-service stations. No "white" area would be created by the theoretically reduced Grade B coverage area.[6] And while the proposed modification would leave a "gray" area for 231 persons, 504 other persons would no longer reside within a gray area and would now enjoy Channel 22 as their second fullpower television service.[7] We also cannot overlook the fact that grant of the modification and accompanying assignment would enable the citizens of Fort Collins to enjoy their first local television station. Specifically, as modified, Channel 22 would provide: (1) 179 persons with their first commercial Grade B service; (2) 592 persons with their second commercial Grade B service; (3) 1,023 persons with their third commercial Grade B service; (4) 65,745 persons with their fourth commercial Grade B service; and (5) approximately 139,517 persons with their first over-the-air Fox network Grade B or better service.[8]

8. We also note that Fort Collins, with a 1990 population of 87,758, lies about sixty miles north of Denver and is within Denver's area of dominant influence (ADI). The Denver ADI is the nineteenth largest television market, comprising 1,048,400 households, or nearly three million persons. We are persuaded by Chase's assertions that this geographic proximity not only makes it difficult for a Fort Collins stand-alone television station to obtain network affiliation or syndicated programming, but also to compete for advertising revenues. However, a modified technical facility, with concomitant reduced construction and operating costs,[9] offers the possibility of economic viability for a potential licensee, as well as a source of additional programming for the Fort Collins area. In view of all of these factors, we believe that, on balance, the proposed modification would serve the public interest.

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[5] Our satellite criteria are discussed in detail at paragraphs 9-13, *infra*.

[6] A "white" area is one that is encompassed by no Grade B television service.

[7] A "gray" area is one that is encompassed by the predicted Grade B contour of only one television station.

[8] In its Reply to Supplemental Information, WGN suggests that these numbers are misleading because 13 low power television and translator stations lie within the underserved areas of Channel 22's proposed coverage area. We find WGN's argument unpersuasive. First, WGN has not stated the extent, if any, to which the translator stations would modify the figures provided. Second, even though it is likely that there are secondary services also located in the "loss area," we have not included them in that count either. The only like figures we have are for full-service stations and, as indicated, those figures support the applicants' proposed modification.

[9] In *Hector Nicolau*, 5 F.C.C. Rcd 6370, 6372 n.2 (1990), we recognized the efforts of an applicant to reduce its operating costs by applying for a service area reduction contemporaneously with a satellite application. Here, in its supplemental filing, Chase contends that the modification it seeks, if granted, will yield substantial savings in its operation of Channel 22. For example, Chase plans to save at least $150,000 plus energy costs by using a more efficient, higher gain antenna, which will allow it to substitute a 60 kilowatt transmitter for the 110-kilowatt transmitter originally proposed by Eagle. Although WGN speculates that there are other means to achieving cost reduction while maintaining the same coverage area, it is evident that the use of a transmitter of 60 kilowatts at a height above average terrain (HAAT) of 318 meters will yield savings that could not be had by use of 110 kilowatts at a HAAT of 429 meters.

Application of Section 73.3597(a) of the Commission's Rules

9. Section 73.3597(a) of the rules provides that if, upon examination of an application for Commission consent to an assignment of a broadcast construction permit or license, it appears that the station has been operated on-air by the current licensee or permittee for less than one year, the application will be designated for hearing unless one of several exceptions exist. WGN contends that this Section 73.3597(a) hearing requirement applies to the assignment of Channel 22, because the construction permit was obtained after a comparative hearing and the station has not been operational for at least a year. In addition, WGN argues that Eagle's only relief from the one-year holding rule, Section 73.3597(a)(4), is an "affirmative factual showing" of a lack of capital, the death or disability of station principals or a demonstration of other changed circumstances affecting the permittee. WGN asserts that Eagle has not made such a showing. However, Section 73.3597(a) is applicable solely to operational stations, not to unbuilt stations such as is before us. *TV-8, Inc.*, 2 F.C.C. Rcd 1218, 1220 (1987); *see also Transfer of Broadcast Facilities*, 52 R. R. 2d 1081 (1982), *modified on other grounds*, 99 F.C.C. 2d 971 (1985). The assignment of Channel 22, an unbuilt station,[10] is subject only to, and has met, the provisions of Section 73.3597(c)-(d), which limit the consideration for the sale of an unbuilt station to legitimate and prudent expenses incurred in connection with the construction of a station.[11]

Satellite Request

10. Under the Commission's policy concerning television satellite operations, *Television Satellite Stations Review of Policy and Rules*, 6 F.C.C. Rcd 4212 (1991) (*Satellite Report and Order*) (petitions for partial stay and reconsideration pending),[12] an applicant for television satellite status is entitled to a presumption that the proposed satellite operation is in the public interest if it meets the following three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Satellite Report and Order*, 6 F.C.C. Rcd at 4213-14. Applications that qualify for the presumption, when unrebutted, will be viewed favorably by the Commission. *Id.* at 4214.

11. Applying these criteria, we find, based on the engineering studies supplied by the applicants, that there is no overlap of the City Grade contours of KDVR and Channel 22 as modified pursuant to the contingent modification application granted herein. WGN has not contested these engineering showings and, accordingly, the applicants have satisfied the first criterion.

12. With regard to the second criterion, the proposed satellite must meet one of two tests in order to qualify as serving an underserved area. The "transmission" test, which deems the satellite's community of license underserved if no more than two full-service stations are licensed to it, has been met by Channel 22, since there are no educational, commercial or satellite television stations licensed to Fort Collins. Again, WGN does not dispute the sufficiency of the applicants' showing under this aspect of the second criterion.[13]

13. The third criterion, which WGN correctly asserts was cursorily addressed in the initial waiver request, requires a showing that there is no alternative operator ready and able to construct and operate Channel 22 as a full-service station. In its supplemental showings, Eagle explains the reasons which prompted it to sell the Channel 22 construction permit[14] and provides a chronology of its efforts to sell the permit to a buyer who would operate Channel 22 as a full-service station.[15] Sometime in 1988 or 1989, Eagle met with a broker from Blackburn and Company, who, according to Eagle, declined to serve as Eagle's

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[10] Section 73.3597(c)(1)(i) of the Commission's Rules defines an "unbuilt station" as one "for which a construction permit is outstanding," and for which program tests have not commenced, regardless of the stage of physical completion.

[11] WGN argues in its petition to deny that Eagle and Chase have not satisfied Section 73.3597(c)(3)(i), which requires declarations by both assignor and assignee that there are no other agreements or understandings for: reimbursement of the seller's expenses or other payments to the seller; the seller's retention of any interest in the station; and options or any other means by which the seller may acquire such an interest. Eagle and Chase have since submitted such signed declarations, bringing them into full compliance with the "out-of-pocket" expense rule.

[12] Chase's satellite request, filed February 18, 1991, and WGN's Petition to Deny, filed May 9, 1991, were based on the Commission's then existing approach to assessing satellite applications. However, the applicants' Joint Opposition, the Petitioner's Reply, and supplemental pleadings submitted in response to staff inquiries rely on the revised satellite policy, which applies to all cases pending as of August 14, 1991. Therefore, we will not address WGN's arguments regarding the degree of parent-satellite overlap and the efficiency of spectrum use, since they have been incorporated into the first criterion of our presumption.

[13] Consequently, Channel 22 need not satisfy the second test, the "reception" test, which requires that at least 25 percent of the satellite's Grade B contour that lies outside the parent's Grade B contour receive no more than four services, excluding the satellite service.

[14] According to Eagle, the television market that existed in 1983, when it applied for a construction permit to operate Channel 22 as a full-service station, changed radically by the time the Commission's grant of the permit to Eagle was affirmed by the Court of Appeals in 1988. By that time, at least four additional construction permits for commercial UHF television stations had been granted in the Denver ADI. Eagle also detailed the difficulties it encountered in attempting to obtain network programming. While WGN contends that these difficulties were not insurmountable, we do not require that an assignor exhaust all programming possibilities and we will not engage in speculation as to which programmers Eagle should have contacted in order to proceed with its initial plans for a full-service station.

[15] As WGN notes, the staff's inquiry letter to Eagle also requested specific data concerning the economic climate of Fort Collins in 1983 and 1988. This request was designed to elicit information that would have been beneficial to the Commission in evaluating the satellite proposal on a "compelling circumstances" basis had the applicants not qualified for the presumption. *See, e.g., Midwest Communications Inc.*, 7 F.C.C. Rcd 159, 161-62 (1991). Because we find that the proposal is entitled to the presumption, the information requested is not now needed, and it is not essential that Eagle further supplement its pleadings.

agent due to the weak market for UHF television construction permits. As a result, Eagle decided to sell the station on its own. It placed two sets of advertisements in Broadcasting magazine in 1990, and from 1989 to 1990, Eagle states that it fielded seven separate inquiries regarding the sale of Channel 22. Of these prospective buyers, only two made offers. The first offer was unacceptable, according to Eagle, because the purchase price for the construction permit was to be financed with the future profits of the station itself; no cash payment was to be made at closing. The second offer, from Chase, was agreeable to Eagle because Chase proposed to pay at closing a sum of $150,000, which is less than Eagle's out-of-pocket costs and an amount permitted by Section 73.3597(c)(2) of our rules. Based on the above information, we find that Eagle has exercised due diligence in trying to find a buyer,[16] and has demonstrated that there is no alternative operator ready and able to construct and operate Channel 22 as a full-service station.

14. Consequently, Eagle is entitled to a presumption that our grant of the satellite request is in the public interest.[17] In addition, we conclude that WGN has failed to rebut this presumption, and we find no cause for overriding the presumption on our own motion.

15. Therefore, having considered all of the information submitted, we find the petition to deny and related informal objection filed by WGN fail to raise a substantial and material question of fact requiring a hearing. *See, e.g., Astroline Communications, Inc. v. F.C.C.*, 857 F.2d 1556 (D.C. Cir. 1988). We further find that the applicants are fully qualified and that a grant of this application will serve the public interest.

16. Accordingly, IT IS ORDERED, That the petition to deny and the informal objection filed by WGN of Colorado, Inc. ARE DENIED.

17. IT IS FURTHER ORDERED, That the above-captioned application to modify the authorized facilities of Channel 22 IS GRANTED.

18. IT IS FURTHER ORDERED, That the above-captioned application for consent to the assignment of the construction permit for unbuilt station Channel 22, Fort Collins, Colorado, from Eagle 22, Ltd. to Chase Communications Corp. IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[16] *See Satellite Report and Order*, 6 F.C.C. Rcd at 4215.

[17] In addition, we find that the satellite policy should assuage WGN's concern that our authorizing satellite status to Channel 22 would forever preclude the establishment of a full-service television station at Fort Collins. First, the policy abolishes any limit on the amount of local programming a television satellite station can originate. This promotes localism and diversity in areas served by satellite operations, and frees Channel 22 to create an unlimited number of programs of local interest for its Fort Collins audience. *Satellite Report and Order*, 6 F.C.C. Rcd at 4215. Second, if satellite station Channel 22 is the subject of a future assignment, those applicants will be required to demonstrate that the conditions warranting satellite status today, including the showing that no alternative operator is ready and able to operate the satellite as a stand-alone station, continue to prevail at the time of the assignment. *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SIETE GRANDE TELEVISION, INC.

For Authorization to Construct a Broadcast Auxiliary Facility for Station WSTE(TV), Channel 7, Ponce, Puerto Rico	BPCT-900531KE
and	
For Authorization to Construct New Booster Facilities for WSTE(TV), in Mayaguez, Arecibo, and San Juan, Puerto Rico	BPVB-900531IA BPVB-900531IB BPVB-900531IC

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 1992; Released: August 20, 1992

By the Commission:

1. The Commission has before it for consideration: (a) the above-captioned application of Siete Grande Television, Inc. (Siete Grande) for a construction permit for an auxiliary television transmitter and antenna for station WSTE(TV), channel 7, Ponce, Puerto Rico, and an accompanying request for waiver of Section 73.1675(a) of the Commission's Rules, relating to the use of auxiliary antennas; and (b) the above-captioned applications of Siete Grande for permits to construct three new television booster stations for WSTE(TV) at sites near Mayaguez, Arecibo, and San Juan, Puerto Rico, and a request for waiver of Section 74.735(d) of the Commission's Rules, relating to booster station power limitations. The applications are unopposed.

BACKGROUND

2. We note at the outset that Siete Grande is seeking to establish on a permanent basis a unique television broadcast operation which the Commission previously authorized on an experimental basis. In 1986, the Commission authorized the licensee of WSTE(TV)[1] to construct an experimental broadcast facility in the Ponce, Puerto Rico area, in order to determine whether a system of multiple cochannel transmitters, simultaneously broadcasting, could provide better service than the authorized single transmitter in an area of mountainous terrain. *Ponce Television Corporation*, 1 FCC Rcd 1167 (1986), *recon. denied*, 2 FCC Rcd 5878 (1987). *See also, Channel 7, Inc.*, 4 FCC Rcd 5258 (1989). The licensee in that proceeding sought, among other things, to bring its service to those large areas of Puerto Rico within WSTE(TV)'s predicted Grade B contour which were not actually receiving the station's signal. The Commission recognized that actual over-the-air coverage of television stations on the island may be significantly more limited than the coverage indicated by predicted Grade A and B contours, due to mountainous terrain. *Ponce Television Corporation* at 1180, citing *Zaida Perez Vda. de Perez Perry*, FCC 85-381, released July 26, 1985, at paragraph 11.

3. The multiple transmitter design consisted of an alternate transmitter[2] located in Ponce (the station's community of license) at a location referred to as the South Site, and three other transmitters spaced throughout the island at locations referred to as the North Site, the West Site, and the Arecibo Site.[3] In authorizing the experiment, the Commission noted that, individually, each of the facilities complied with the full-service television rules governing interference (Section 73.610 of the Commission's Rules), and that the only interference the facilities were expected potentially to cause was to each other. *Ponce Television Corporation* at 1182. The Commission also stated that, because the predicted Grade B contour of station WSTE(TV) already encompassed the entire island, the experimental system would confer no additional coverage area beyond that which the station was already entitled to serve. *Id.* at 1185. Broadcasting commenced on the experimental system in February, 1987.

THE WAIVER REQUESTS

4. Siete Grande asserts that the experiment succeeded in greatly improving the station's coverage within its Grade B contour without serious degradation of its signal, improving service to approximately 1.3 million people, and allowing large numbers of people to receive a high quality channel 7 signal for the first time. The applicant therefore requests authorization to operate its experimental facilities on a permanent basis. Siete Grande proposes to use the

[1] The authorization was requested and obtained by Ponce Television Corporation, then the licensee of station WLUZ-TV, channel 7. The Commission authorized the assignment of the station license to Siete Grande on August 5, 1991. For ease of reference, we shall refer to the station by its current call sign, WSTE(TV).

[2] Pursuant to a condition imposed by the Commission on the experimental authority, each successive channel 7 licensee has maintained the licensed main transmitting facility in proper operating condition. The applicant states that the licensed facility will not be used while the multiple transmitters are operating, due to the destructive interference that would result.

[3] The North Site is located 61.6 kilometers (38.3 miles) from the Ponce facilities, near Cerro Marquesa, south of San Juan. The West Site is 65.6 kilometers (40.8 miles) from the Ponce facilities and 112.3 kilometers (69.8 miles) from the North Site, in the hills between Mayaguez and Aguadilla. The Arecibo transmitter is located between the North Site and the West Site, 48.8 kilometers (130.3 miles) from the Ponce facilities. All of the sites are within the predicted Grade B contour of station WSTE(TV), as currently authorized.

Ponce transmitter in conjunction with the transmitters at the North, West, and Arecibo sites, the latter three to be licensed as high-power "boosters." The applicant requests waiver of Section 73.1675(a) of the Commission's Rules, which states that a licensee can broadcast from an auxiliary antenna only when its main antenna is out of service for repairs or replacement. In view of the fact that the proposed power outputs for the North, West, and Arecibo transmitters are 30.2 kW, 7.24 kW, and 0.248 kW, respectively, the applicant has also requested waiver of Section 74.735(d) of the Commission's Rules, which limits the power output of television booster stations to 0.1 kW peak visual power.

5. In support of its waiver requests, the applicant states that use of the transmitters as proposed in the applications will maintain the enhanced service which has been provided to the public since commencement of the experiment. Moreover, Siete Grande claims that the proposed operation fulfills all of the rules for licensing a standard television facility: it provides City Grade coverage to Ponce; it meets the Commission's spacing requirements; and it meets and exceeds the technical performance requirements of Section 73.687 of the Commission's Rules. Also, each of the transmitters provides a Grade B signal which is contained entirely within the predicted Grade B contour of station WSTE(TV) as currently authorized. In addition, according to Siete Grande, the four facilities will not preclude the establishment of any new broadcast operation which is not already precluded by the currently authorized channel 7 facility. The applicant further states that use of the licensed main transmitter during operation of the North, West, and Arecibo facilities would cause excessive interference and drastically reduce the overall service gains achieved during the experiment. Thus, the licensee states, it will continue to maintain the licensed facility in operational condition, but will not employ it when broadcasting from the multiple transmitter sites.

6. Siete Grande further maintains that the proposed facilities are essential to reach unserved and underserved areas of Puerto Rico. The applicant has submitted data analyzing the effectiveness of the experimental system, comparing the coverage it has achieved with that attained by the originally licensed standard facility before commencement of the experiment. According to the licensee's survey of Census-designated areas having a population greater than 10,000 people, the multiple-transmitter system delivered a TASO "good" picture quality service[4] to 91% of the population, while the licensed transmitter had provided a "good" picture quality to only 15% of the population; "fair" picture quality service decreased from 66% to 6% of the population; and "poor" picture quality service decreased from 19% to 3% of the population. The applicant's study asserts that 80% of the population in the measured areas, or approximately 1.3 million people, experienced improved service by virtue of the experimental facilities (and that approximately 297,000 people among this group had previously had no service or poor service); that 17% of the population experienced no change in service; and that had their service deteriorate in quality. All those in the study who had a degradation in quality went from fair to poor service. Siete Grande states that it will continue to pursue methods to reduce any service degradation through additional cochannel transmitters using lower power levels than employed in the experiment. While it seeks to reduce the proportion of the population receiving "poor" quality service to below 1%, Siete Grande asserts that the substantial service enhancement brought about by the experimental facilities throughout the island outweighs any minor service degradation.

7. Finally, Siete Grande states that other public service benefits will accrue by grant of its application. It asserts that its ability to reach large areas of Puerto Rico with high quality service will be vital during natural disasters such as hurricanes; the applicant has submitted the statements of several public officials attesting to WSTE(TV)'s comprehensive news and weather coverage during a recent hurricane that passed over the island after the experiment commenced. Siete Grande also asserts that, without the proposed facilities and the subsequent ability to cover those sections of the island not actually served by its currently authorized facilities, the station would likely go dark. It notes that previous licensees of channel 7 were unable to operate on a competitive basis without the ability to serve adequately the island's main population and economic centers.

DISCUSSION

8. We believe that the mountainous terrain of Puerto Rico supports use of alternative methods to extend broadcast television service to as many people as possible. *See, e.g., Ponce Television Corporation*, above. *See also, Channel 7, Puerto Rico*, 58 FCC 2d 1148, at 1151 (1975). The combination of the island's topography and its geographic isolation places Puerto Rico in a highly unusual position. Its geography significantly obstructs local broadcast signals, and, because of its isolation, it does not receive any broadcast signals from off the island. Nevertheless, that isolation allows broadcasters, such as Siete Grande, the flexibility to utilize innovative means to improve actual coverage without risking cochannel or adjacent-channel interference to others.

9. Based on the evidence presented, we find that grant of Siete Grande's applications will serve the public interest. Analysis of the data submitted by Siete Grande in conjunction with the experiment confirms that the four transmitters greatly improve actual reception of channel 7 throughout the island, allowing improved service to approximately 1.3 million people. Grant of the applications will not extend the station's coverage beyond the area which the applicant is already licensed to serve; indeed, grant of the applications will allow Siete Grande substantially to enhance its service to those whom it is already licensed to serve. In addition, operation of the facilities will cause no interference to any cochannel or adjacent-channel station, nor will it preclude the establishment of any new facility which was not already precluded by the currently authorized channel 7 facility. We further find that the significant improvement in service throughout other parts of the island substantially outweighs any minor

[4] TASO (Television Allocations Study Organization) developed a scale to describe picture quality, breaking it down into six categories. In its application Siete Grande uses the TASO standards to classify picture quality as good, fair, or poor.

service degradation that may result from the operation. In addition, we note Siete Grande's commitment to continue its experimentation with low power boosters in an effort to improve service to those portions of the island that may still have reception problems.

CONCLUSION

10. Accordingly, IT IS ORDERED that the requests of Siete Grande Television, Inc. for waiver of Section 73.1675(a) and Section 74.735(d) of the Commission's Rules ARE GRANTED,[5] and that its applications for modification of the transmitting facilities for station WSTE(TV), channel 7, Ponce, Puerto Rico, ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[5] We emphasize that these booster waivers are based upon the unique factors present in this case and should in no way be construed as a general departure from the power limitations set out in Section 74.735(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial Amendment of Part 95, Subparts A, C, and D of the Commission's Rules Concerning the General Mobile Radio Service, Radio Control Radio Service, and Citizens Band Radio Service, and of Part 97, Concerning the Amateur Radio Service.

ORDER

Adopted: August 7, 1992; Released: August 20, 1992

By the Chief, Private Radio Bureau:

1. By this action, we are editorially amending various rules in the radio services shown in the caption. The rule amendments are necessary in order to delete obsolete dates, to revise mailing addresses, to reflect the current monetary forfeiture amounts for repeated or willful violations of the Communications Act or of the Commission's Rules, and to make other necessary editorial changes.

2. Because the rule amendments adopted herein are nonsubstantive in nature, the notice and comment provisions of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, need not be complied with. Authority for this action is contained in Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1), and 47 U.S.C. §§ 154(i) and 303(r).

3. Accordingly, Part 95, Subparts A, C, and D, 47 C.F.R. Part 95, Subparts A, C, and D, and Part 97, 47 C.F.R. Part 97, ARE AMENDED, effective **October 30, 1992**, as set forth in the Appendix.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

A. Part 95, Subparts A, C, and D of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

1. The authority citation for Part 95 continues to read as follows:

Authority citation: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. The last sentence of paragraph (d) of Appendix A to Part 95, Subpart A, is amended by changing the rule citation referred to therein. As amended, that sentence reads as follows:

APPENDIX A TO PART 95 -- MAKING A CONTROL STATION POWER TEST

* * * * *

(d) *** The maximum transmitter output power permitted any GMRS station must not be exceeded (see § 95.135).

* * * * *

3. Section 95.207 is amended by changing, in subparagraph (2) of paragraph (a), the line entry in the table of frequencies which reads "79.93" to "72.93", and by deleting subparagraphs (4) and (5) of paragraph (a) in their entirety.

4. Section 95.211(b)(2) is revised to read as follows:

§ 95.211 (R/C Rule 11) What communications may be transmitted?

* * * * *

(b) * * *

(1) * * *

(2) A sensor at a remote location turns on and/or off an indicating device for the operator. (Refer to Diagram 2). Only Channels 26.995 to 27.255 MHz (see R/C Rule 7, § 95.207(a)(1)) may be used for this purpose. (A remote location means a place distant from the operator.)

5. Section 95.218(a) is revised to read as follows:

§ 95.218 (R/C Rule 18) What are the penalties for violating these rules?

(a) If the FCC finds that you have willfully or repeatedly violated the Communications Act or the FCC Rules, you may have to pay as much as $10,000 for each violation, up to a total of $75,000. (See Section 503(b) of the Communications Act.)

* * * * *

6. The third sentence of Section 95.419(b) is amended by changing the mailing address referred to therein. As amended, that sentence reads as follows:

§ 95.419 (CB Rule 19) May I operate my CB station transmitter by remote control?

* * * * *

(b) * * * Send your request and justification to FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

* * *

* * * * *

7. Section 95.421(a) is revised to read as follows:

§ 95.421 (CB Rule 21) What are the penalties for violating these rules?

(a) If the FCC finds that you have willfully or repeatedly violated the Communications Act or the FCC Rules, you may have to pay as much as $10,000 for each violation, up to a total of $75,000. (See Section 503(b) of the Communications Act.)

* * * * *

B. Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301, 609, unless otherwise noted.

1. The second sentence of Section 97.17(d) is amended by changing the mailing address referred to therein. As amended, that sentence reads as follows:

§ 97.17 Application for new license.

* * * * *

(d) * * * The application must be submitted to the FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

* * * * *

2. The last sentence of Section 97.19(b) is amended by changing the mailing address referred to therein. As amended, that sentence reads as follows:

§ 97.19 Application for a renewed or modified license.

* * * * *

(b) * * * All other applications must be submitted to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

* * * * *

3. The second sentence of Section 97.27 is amended by changing the mailing address referred to therein. As amended, that sentence reads as follows:

§ 97.27 Replacement license.

* * * The request must be made to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. * * *

4. Second 97.303 is amended by changing the second word in paragraph (h) from "amatuer" to "amateur" as follows:

§ 97.303 Frequency sharing requirements.

* * * * *

(h) * * * amateur * * *

* * * * *

5. Section 97.513(b) is revised to read as follows:

§ 97.513 Novice Class operator license examination.

* * * * *

(b) Within 10 days of the administration of a successful examination for a Novice Class operator license, the administering VEs must submit the application to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

6. The second sentence of Section 97.519(b) is amended by changing the mailing address referred to therein. As amended, that sentence reads as follows:

§ 97.519 Coordinating examination sessions.

(b) * * * The coordinating VEC must screen and forward all applications for qualified examinees within 10 days of their receipt from the administering VEs to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 14, 1992

INFORMATION ON APPLICATION FILING PROCEDURES FOR THE INTERACTIVE VIDEO AND DATA SERVICE

GEN. Docket No. 91-2

On January 16, 1992, the Commission adopted a *Report and Order* (*R&O*) in GEN Docket No. 91-2 establishing an Interactive Video and Data Service (IVDS) under Part 95 of its Rules (47 C.F.R. Part 95). In the *R&O* the Commission stated that it would announce by Public Notice the date on which it would begin accepting applications for IVDS system licenses as well as other pertinent information concerning licensing IVDS systems. The purpose of this Public Notice is to establish an IVDS application filing window and explain the filing procedures necessary for filing applications for an IVDS system license in service areas #6 (Boston, MA), #7 (San Francisco, CA), #8 (Washington, DC), #9 (Dallas, TX), and #10 (Houston, TX). For a description of the service areas see the Commission's January 24, 1992, Public Notice, Report No. 92-40.

Applications for an IVDS license for these five service areas must be received at the official filing location listed herein during the three-day filing period beginning September 15, 1992, and ending September 17, 1992. Applications received before September 15, or after September 17, 1992, will be dismissed as untimely filed. The back-up filing procedure and the extra day policy do not apply to IVDS applications.[1] NOTE: Applicants may have an interest in only one application in each service area.

All applications must be filed on FCC Form 155 (a separate application is required for each service area) and each application must be accompanied by a separate check made out to the Federal Communications Commission or FCC in the amount of $1,400.00. Failed payment or postdated checks will result in the application being dismissed with prejudice. In Section I of Form 155, the "Applicant Name" block must include the applicant's name (either typed or printed) followed by the signature (original) of an individual authorized to sign the application. The mailing address should be the address to which the applicant wishes official correspondence sent. The number of the service area being applied for (either "006", "007", "008", "009", or "010") must be specified in the box labeled "Call Sign". The fee type code entered in Column (A) must be "PAI", the fee multiple in Column (B) must be "40", and the fee due in column (C) must be $1,400.00. Each individual application (Form 155) and accompanying check ($1,400.00) must be in an individual sealed envelope and properly addressed (see mail in address). Multiple applications, properly packaged, may be delivered in one larger, properly addressed container.

The Commission's official filing location for these applications is Mellon Bank in Pittsburgh, Pa. Applications may be delivered to Mellon Bank in one of two ways, either mailed in or walked in.

Mail-ins

Filings mailed in must be mailed to:

Federal Communications Commission
Interactive Video and Data Service
P.O. Box 358365
Pittsburgh, PA 15251-5365

(This address must be used on the individually sealed envelopes.)

Walk-Ins

Pursuant to the provisions of 47 C.F.R. § 0.401(b)(2), applications may be hand-delivered. Applications hand-delivered must be in a sealed envelope with the mail-in address specified above on its face. A separate envelope is needed for each application and accompanying check. Hand-delivered applications must be delivered to One Mellon Bank Center, 500 Grant Street, Pittsburgh, PA. 15258 anytime between 12:01 a.m. September 15, 1992, and 11:59 p.m. September 17, 1992.

The street entrance to the Window Filing location is on the Grant Street side of the building (across from the US Air ticket office). Signs will be posted in both One Mellon Bank Center and Three Mellon Bank Center indicating the Filing Window location. The "deliverer" should proceed directly to the street entrance described above and identify himself (herself) as having applications for the IVDS filing window. If a copy is proffered for stamping, *one* receipt only will be date stamped per application and returned.

CAUTION: The filing instructions incorporated in this Public Notice are only in effect for the purposes stated herein. These procedures override any other procedures that may be set forth in the Commission's Rules. Failure to follow the filing procedures specified herein will render an application unacceptable for filing. Such an application will be dismissed with prejudice.

[1] The back-up filing procedure enables certain applicants to file late if they follow certain procedures and if their applications are lost or delayed in transit to Pittsburgh, Pennsylvania. The extra day policy allows certain applicants to file one day after the filing deadline. These policies, however, only apply to time critical, feeable applications previously filed in Washington, D.C. and IVDS applications, which are new, have never been filed in Washington. Thus, if an IVDS application is received in Pittsburgh on September 18, 1992, the day after the filing window closes, or thereafter (regardless of the reason for delay), the application will be dismissed as untimely filed.

After the filing window has closed the Commission will issue a Public Notice as soon as feasible listing the applications filed for these five service areas. In the event the Commission receives more than two acceptable applications for an IVDS system license for any of the service areas, all the applications for that particular service area will be considered mutually exclusive. The Commission will use a lottery conducted in accordance with 47 C.F.R § 1.972 to choose among mutually exclusive applications. If a lottery is necessary, the Commission will announce by Public Notices (1) when a lottery will be held and (2) the lottery winners (tentative selectees). Tentative selectees will then have two business days from the date of the Public Notice announcing the winners to file a FCC Form 574 (plus required showings) amending their original application. The burden will be on the tentative selectees to provide all necessary information. If for some reason one or both of the tentative selectees' applications in a service area are dismissed, the Commission will open another filing window for that service area.

While the Commission intends to open all 734 service areas as quickly as possible, it will not issue system licenses until the first IVDS transmitter has been type accepted for operation in this service. Moreover, it is important to remember that an applicant that has been awarded an IVDS system license must meet certain construction benchmarks or automatically lose the license. Further an IVDS system licensee is prohibited from transferring the license until the 5-year construction benchmark has been met.

For further information contact Consumer Assistance Branch, 717-337-1212.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications — Transmittal Nos. 269 and 280

Tariff F.C.C. No. 1

ORDER

Adopted: August 11, 1992; Released: August 14, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. US West Communications, Inc. (US West) filed Transmittal No. 269 on June 17, 1992, to reduce the nonrecurring charges associated with reconfiguring a tandem access route to a direct access route on Circuit Switched Trunkside 1 (CST1) or Feature Group B (FGB), and Circuit Switched Trunkside 3 or Feature Group D, switched access service. Description and Justification (D&J) at 1.2. Transmittal 269 also waives the nonrecurring charges for customers changing from DS1 to DS3 level digital transmission at the point of termination at the customer's premises when the customer has and will maintain its existing CST1 or FGB switched access service. *Id.* at 1.3

2. The discount and the waiver of charges are available only to customers who meet certain criteria specified in the tariff, which include reconfiguring 24 voice grade lines at a time. *Id.* at 1.2, 1.3; US West Tariff F.C.C. No. 1 at Original Page 6-125.5. US West states that reducing the nonrecurring charges for customers who are changing from tandem to direct access routes will promote additional network efficiencies by minimizing the barriers to network reconfiguration. *Id.* at 1.2. Transmittal 269 is scheduled to become effective on August 16, 1992. On July 2, 1992, Telephone Express filed a petition to reject or, in the alternative, to suspend and investigate Transmittal 269. US West replied to the petition on July 13, 1992.

3. Small carriers, contends Telephone Express, lack sufficient traffic to justify purchasing the number of lines necessary to qualify for the waiver of charges for carriers who rearrange their networks from DS1 to DS3 service. Telephone Express Petition at 3. According to Telephone Express, network rearrangement from DS1 to DS3 service is "like" network rearrangement from tandem access to direct access. *Id.* at 5. However, claims Telephone Express, the transmittal results in discriminatory pricing -- charges are waived for large carriers rearranging their networks from DS1 to DS3 but are required of small carriers changing from tandem to direct access. *Id.* at 34. Therefore, says Telephone Express, Transmittal 269 is unreasonably discriminatory, in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), against small carriers who replace common transport with dedicated switched access transport. *Id.* at 4.

4. Telephone Express also contends that Transmittal 269 is unreasonably discriminatory, in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), because small carriers will be denied access to the minimum unit of capacity -- a DS0 or one voice grade line -- for purchasing dedicated switched access transport. *Id.* at 7-8. If the Commission does not reject Transmittal 269, it argues, US West should revise this transmittal to change the minimum capacity for purchasing direct access to DS0 or one voice grade service line. *Id.* at 9-10.

5. US West replies that the petitioner misunderstands Transmittal 269. According to US West, Telephone Express compares reconfigurations of US West service (upgrades from DS1 to DS3, and changes from common transport to dedicated transport), concludes that these two reconfigurations are "like" services, and claims that the tariff is unreasonably discriminatory because small carriers are charged more than large carriers for the same service. US West Reply at 3-4. Because it is offering two "unlike" underlying services (DS3 service and direct access routing), argues US West, there is no "likeness" issue and, therefore, no discrimination. *Id.* at 4-5. In addition, states US West, Transmittal 269 does not affect the minimum level of capacity -- one voice grade line or a DS0 circuit -- that a carrier must order to purchase switched access service. *Id.* at 5. [1]

6. The Common Carrier Bureau has reviewed the US West transmittals and all associated submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate US West Communications Inc. Tariff F.C.C. No. 1, Transmittal No. 269, filed by Teleconcepts, Inc. d/b/a Telephone Express IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy),
Common Carrier Bureau

[1] US West subsequently filed tariff revisions to clarify that DS0, or one voice grade line, service will remain available for small carriers who do not have enough traffic to utilize DS1 or DS3 trunking. US West Tariff F.C.C. No. 1, Transmittal No. 280, July 29, 1992. US West also submitted a letter explaining the cost efficiencies of converting 24 voice grade lines at a time. Letter from J. Stahlhut to Chief, Tariff Division, Common Carrier Bureau, July 24, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-91

In the Matter of

Commission Requirements for Cost
Support Material to be Filed with
Open Network Architecture
Access Tariffs

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1992; Released: August 14, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. This Order revises the schedule for filings in this investigation, in response to a Motion for Extension of Time filed by American Telephone and Telegraph Company (AT&T) on August 7, 1992. The revised schedule will enable parties to comment in a unified pleading cycle on (i) the BOCs' direct cases; (ii) the cost models used to develop investment figures for ONA services; (iii) the adequacy of the redacted cost models and the discretionary disclosure procedures developed to enable comment on sensitive aspects of cost support; and (iv) the independent auditor's review of the cost models.[1]

I. BACKGROUND

2. On January 31, 1992, the Common Carrier Bureau (Bureau) initiated an investigation into open network architecture (ONA) tariffs filed by Bell Operating Companies (BOCs).[2] In the companion *SCIS Disclosure Order*, the Bureau determined that Switching Cost Information System (SCIS) software and documentation, and other, similar software used to develop cost support materials for Open Network Architecture (ONA) tariffs, should be disclosed to the maximum extent, consistent with safeguarding the proprietary status of these materials. The Bureau also determined that certain proprietary aspects of the BOCs' computer models and related switch vendor data cannot practicably be disclosed on the public record without compromising the proprietary nature of the data.[3] The *SCIS Disclosure Order* thus ordered the BOCs to make available to intervenors a version of SCIS with the most sensitive proprietary information redacted from the model and related documentation. The Order also established procedures, including a prescribed nondisclosure agreement, by which parties to this investigation were to be provided access to this redacted version of SCIS. The same Order required the BOCs to retain an independent auditor to examine the SCIS model design and perform sensitivity analyses with the model, and report those results to the Commission.

3. In response to the *SCIS Disclosure Order*, Bellcore on February 20, 1992 filed SCIS materials with the Commission, with proprietary materials redacted. Intervenors alleged that the redacted materials filed by the BOCs to comply with instructions in that Order were seriously deficient, and that the resulting delay in obtaining more useful access to cost support constrained intervenors' informed preparation of comments directed to the BOCs' direct cases in this Docket. Acting on a request from MCI, supported by Ad Hoc and AT&T, the Bureau on June 9, 1992 extended the date for comments on direct cases until August 17, 1992.[4]

II. DISCUSSION

4. Since the Bureau released our order extending the pleading cycle in this proceeding, a number of events have occurred that require us to again amend our schedule for this investigation. First, based on our initial review of the redacted SCIS materials and the intervenors' view of the usefulness of the material, the Bureau informally encouraged vendors and Bellcore to work toward an alternative redaction approach within the parameters set by the *SCIS Disclosure Order*. On June 25, 1992, Bellcore personnel explained at a meeting with Bureau staff and switch vendor representatives a proposed second-generation redaction of SCIS software and related documentation (Redaction

[1] The BOCs develop cost support material for ONA services based in part on investment figures generated by the Switching Cost Information System (SCIS), a computer model administered by Bell Communications Research (Bellcore) that quantifies the engineering processes of a switching office in order to apportion switch capacity and cost among the features and functions the switch provides. US West uses a model that it calls Switching Cost Model (SCM), which US West alleges to be similar to SCIS. Our comments and decisions on SCIS made herein also specifically apply to the US West SCM, unless noted otherwise.

[2] Bell Atlantic Telephone Companies, *et al.*, Open Network Architecture Tariffs, CC Docket No. 92-91, 7 FCC Rcd 1512 (Com.Car.Bur. 1992) (*ONA Investigation Order*). The Bell Operating Companies are the Ameritech Operating Companies, (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West). The Bureau had previously initiated an investigation into Ameritech's ONA tariffs, in December 1991. Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, Memorandum Opinion and Order, 7 FCC Rcd 257 (Com.Car.Bur. 1991) (*Ameritech ONA Tariff Order*), *modified by* Ameritech Operating Companies, 7 FCC Rcd 948 (Com.Car.Bur. 1992). A subsequent order designated supplemental issues for investigation arising from Nevada Bell's Transmittal Nos. 130 and 132. Nevada Bell, Open Network Architecture Tariffs, CC Docket No. 92-91, 7 FCC Rcd 4051 (Com.Car.Bur. 1992). The filing schedule for those supplemental issues is consolidated by this Order as noted in para. 13, *infra*.

[3] 7 FCC Rcd 1526 (Com.Car.Bur. 1992). The Bureau had determined in a prior Order that the materials at issue were exempt from mandatory disclosure under the Freedom of Information Act. *Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs*, Order, 7 FCC Rcd 521 (Com. Car. Bur. 1991) (*SCIS In Camera Order*), *affirmed* Allnet Communications Services, Inc., FOIA Control No. 92-226, FCC 92-356, released Aug. 3, 1992.

[4] Order, 7 FCC Rcd 4106 (Com.Car.Bur. 1992).

II), based on a revised approach developed by BOCs and affected switch vendors. The *ex parte* statement submitted by Bellcore July 13, 1992, describes the main elements of this altered approach.

5. Bellcore subsequently filed the Redaction II software and related documentation on July 31, 1992, with a request for confidential treatment. It simultaneously offered these materials to intervenors who agree to use Bellcore's protective procedures by submitting a Notice of Compliance.[5] Under these procedures the second-generation redaction of SCIS software will be made available for intervenors' inspection, including sensitivity analysis studies, at Bellcore premises during the period from August 4 to September 14, 1992.[6]

6. Also on July 31, 1992, US West filed a second-generation redaction of the SCM model and related documentation for the Commission's *in camera* review, and invited intervening parties to review these materials provided that: (1) they had previously signed the nondisclosure agreement included in the *SCIS Disclosure Order;* (2) had returned the Redaction I materials to US West; and (3) agreed to the terms of the Notice of Compliance attached to the July 31 cover letter, which US West also sent to all parties of record. US West attached a proposed schedule for access to the SCM software and documentation at its Washington, D.C. offices, over the period from August 19 to August 26, 1992.[7]

7. The second-generation redactions and associated protective disclosure procedures that are now proposed by the BOCs differ significantly from the redactions originally developed in response to the *SCIS Disclosure Order*. The SCIS documentation is more fully revealed under Redaction II than under the first version. Vendor-specific nomenclature, generic switch architecture diagrams, and generic descriptions of SCIS methodology, which were redacted in the first effort, are disclosed in Redaction II. As to the SCIS software itself, the second redaction appears to enable intervenors to use the software to perform actual SCIS investment studies for a specific switch technology that reasonably resemble the SCIS investment studies on which the BOCs relied in their rate development process. In contrast, the previous redaction's use of randomized vendor data within the SCIS software precluded even an approximate replication of investment studies relied on to develop ONA service rates.

8. The inclusion of actual vendor data in the software, however, renders physical distribution of the software to intervenors significantly more risky for switch vendors' competitive interests. Bellcore and the vendors have therefore established different procedures for intervenors to use the software than were described in the *SCIS Disclosure Order, e.g.,* the software will be available only at Bellcore locations in Washington, D.C., and Livingston, N.J.

9. Finally, Arthur Andersen & Co. SC (Andersen) on July 31, 1992 filed the redacted version of the independent auditor's report required by the *SCIS Disclosure Order,* with a request for confidentiality, and specified procedures for distribution of the report to parties who had signed the nondisclosure agreement included in the *SCIS Disclosure Order.*[8] Andersen also sent its cover letter to all parties of record.

10. As a result of these developments, we again modify the schedule for investigation of BOC ONA rates as follows. In order to give intervenors time to analyze Redaction II, we extend the time for comments in the investigation to October 16, 1992. Replies shall be due November 13, 1992. Parties may comment on the issues designated for investigation, the BOCs' direct cases, and the cost models used to develop investment figures for ONA services. We also invite comment on the adequacy of discretionary disclosure procedures for Redaction II, including that method's balancing of the competing interests in public participation and safeguarding proprietary data that were discussed in the *SCIS Disclosure Order,* and any comments on the independent auditor's review. Any questions parties recommend that the Commission ask the independent auditor shall also be filed October 16, 1992.[9]

11. We therefore grant AT&T's motion for extension of time to the extent indicated herein, and clarify the issues for discussion on our own motion. We do not anticipate granting further extensions of time in this proceeding.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the Motion for Extension of Time to file Opposition to Direct Cases, filed by American Telephone and Telegraph Company August 7, 1992, IS GRANTED to the extent indicated herein.

13. IT IS FURTHER ORDERED that the supplemental issues designated for investigation with respect to Nevada Bell's ONA services shall be consolidated with the issues generally designated by the *ONA Investigation Order,* and shall be subject to the identical pleading cycle.

14. IT IS FURTHER ORDERED that intervenors SHALL FILE public comments on the BOCs' direct cases, including all materials obtained under discretionary disclosure procedures, no later than October 16, 1992. BOCs SHALL FILE REPLIES to the comments on direct cases in the captioned proceeding, no later than November 13, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen Levitz
Deputy Chief (Policy)
Common Carrier Bureau

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[5] Bellcore sent all parties to the proceeding a copy of the July 31, 1992 cover letter and compliance procedure.

[6] Letter from J. Britt, Bellcore, to S. Wiggins, Tariff Division, Aug. 11, 1992. A copy of this letter was sent to parties of record by facsimile.

[7] US West's procedure is contingent upon agreement by switch vendors that US West's redacted SCM materials adequately safeguard their proprietary interests.

[8] Andersen submitted its unredacted report on July 22, 1992, for review by Commission staff.

[9] Intervenors' queries involving cost support materials determined or alleged to be competitively sensitive should be filed separately, with a request for confidential treatment, no later than October 16, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 14, 1992

ADDITIONAL COMMENTS SOLICITED WITH RESPECT TO ISSUES RAISED IN PETITIONS FOR RECONSIDERATION OF THE PART 69/ONA ORDER

CC Docket No. 89-79

On July 16, 1992, the Commission adopted a Memorandum Opinion & Order on Second Further Reconsideration, FCC 92-325, released Aug. 6, 1992. That decision addressed the Docket 87-313 price cap new services test issues raised in petitions for reconsideration of the *Part 69/ONA Order*, 6 FCC Rcd 4524 (1991). It did not address the other issues raised in the petitions for reconsideration of the *Part 69/ONA Order*. These issues include the pricing standard for basic service elements (BSEs), the elimination of bundled feature groups, and maintanance of the status quo with respect to access charge treatment of enhanced service providers (ESPs). Before acting on the remaining issues raised by the petitions for reconsideration, we give parties an opportunity to update the record in light of intervening events, such as the effectiveness of federal ONA tariffs.

Interested parties should file comments on the request by **September 30, 1992**, and reply comments by **October 30, 1992**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Mark S. Nadel, Common Carrier Bureau, FCC, Room 544, 1919 M St., N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from the Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Mark Nadel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

B. F. Investments, Inc. File Nos. 1486-CM-P-83
1528-CM-P-83

For Authority to
Construct and Operate
Multichannel Multipoint Distribution
Service Stations on the F-group
Channels at Saginaw, Michigan
and York, Pennsylvania

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1992; Released: August 20, 1992

By the Deputy Chief, Domestic Facilities Division:

INTRODUCTION

1. This *Memorandum Opinion and Order* concerns a petition to deny filed against the above-referenced applications of B. F. Investments, Inc. (hereinafter referred to as BFI) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels in the Saginaw, Michigan and York, Pennsylvania markets. The petition was filed by the Committee for Fair MDS Lotteries (hereinafter referred to as the Committee or as the Petitioner). BFI's Saginaw and York MMDS applications were selected for qualification review as the result of Commission lotteries held on August 29, 1986 and April 11, 1990. For the reasons discussed below, we deny Petitioner's request.

ARGUMENTS

2. Generally, the Committee contends that BFI and fifteen other MMDS applicants,[1] acting in a coordinated effort and under the direction of Bruce Merrill (Merrill),[2] sought to gain control over both MMDS channel groups in major markets throughout the United States by filing, under different corporate names, virtually identical applications in each of these markets. By doing so, the Petitioner alleges that these sixteen applicants violated the Commission's rules which were designed to ensure that no one applicant have more than one chance in an MMDS lottery in a given market.[3] Petitioner requests an evidentiary hearing on BFI's lottery-winning Saginaw and York applications because, they argue, circumstances surrounding the preparation and filing of these applications raise a substantial and material question of fact as to whether Merrill is the undisclosed real party-in-interest behind BFI's applications, in violation of Section 21.13(a)(1) of the Commission's Rules, 47 C.F.R. § 21.13(a)(1). Petitioner further argues that these same circumstances also raise a substantial and material question of fact as to whether BFI, filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the "one-to-a-market" rule.[4] The, Petitioner submits that the following circumstances raise issues of fact and provide support for their request for an evidentiary hearing:

> (1) Bruce Merrill's alleged involvement in obtaining the financing arrangements for BFI and the fifteen other applicants;
>
> (2) Merrill's involvement in the initiation, preparation, payment, and filing of BFI's applications, as well as the applications of the other fifteen applicants, and his assistance in the selection of markets by these applicants;
>
> (3) Relationship between Bruce Francis, President, co-director, and 100% stockholder of BFI and Bruce Merrill. Mr. Francis had extensive connections with Merrill and was, in fact, an employee and officer of Merrill Communications;
>
> (4) Similarities in the articles of incorporation of BFI, and articles of incorporation of some of the other applicant corporations;

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[1] The fifteen other suspect applicants include Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc.

[2] Bruce Merrill is Chairman of the Board of Directors and 100% shareholder of Merrill Communications, Inc. (MerrillCom). "Merrill" will be used therein to refer to either Bruce Merrill or MerrillCom.

[3] BFI's application and the Committee's petition were filed prior to the adoption of Section 21.901(d)(2) which now allows a single operator to acquire a license for both groups of MMDS channels in the same market. *See* Amendment of Part 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Multichannel Multipoint Distribution Service, 5 FCC Rcd 6410 (1990).

[4] At the time the subject applications and the related petition to deny were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of either the same group, or the other group of channels in the same area. 47 C.F.R. § 21.901(d)(2).

(5) Technical and other similarities of BFI's applications with the "cookie cutter" applications of the other fifteen applicants;

(6) the "Letter of Understanding" between BFI and Merrill which provides that Merrill will provide programming services to BFI if BFI is a successful applicant, in consideration for the pre-filing services performed by Bruce Merrill.[5]

3. In response to Petitioner's allegations, BFI states that Bruce Merrill has not controlled BFI in the past, and will not control it in the future. BFI argues that there is no basis for an evidentiary hearing because the petition to deny is speculative, conclusory, and unsupported by substantive evidence. Further, BFI maintains that the Committee's petition contains broad generalizations and inferences that do not give rise to evidence of violations of Commission rules or policies. BFI further argues that the record does not support Petitioner's allegations that BFI violated the real party-in-interest and one-to-a-market rules.

DISCUSSION

4. *Hearing Request.* To obtain an evidentiary hearing, parties challenging an application must satisfy the two-step test established in Section 309(d) of the Communications Act of 1934, as amended. As a threshold matter, Section 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show ... that a grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a prima facie case has been made, then, and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(d)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C. § 309(d)(2). The Court of Appeals for the District of Columbia Circuit has reaffirmed this two-step process for determining the sufficiency of a petition to deny requesting an evidentiary hearing. *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (Astroline); *Gencom, Inc. v. FCC*, 832 F.2d 171, 180, 181 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (Jazz).

5. The Commission's *prima facie* inquiry is limited to consideration of the allegations in the petition to deny and any supporting affidavits. In addition, there is the assumption that the specific facts set forth by the petitioner are true. *Id.* In the instant case, a review of the specific allegations of fact, taken as true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience, and necessity. Proof that BFI failed to disclose the real party-in-interest and filed multiple applications would alter the Commission's public interest determination. *See, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car. Bur. 1988).

6. Having found that the petition comports with the requirements of Section 309(d)(1), we now must determine whether a substantial and material question of fact has been raised by the Petitioner.[6] In making this determination, the Commission is given greater latitude and is permitted to consider the totality of evidence presented (*ie.*, petitioner's evidence, rebuttal evidence, and other matters the Commission may officially notice).

7. *Real Party-in-Interest Issue.* The Committee submits that Merrill's direct and indirect participation in the preparation of the MMDS applications filed by BFI suggests that Merrill is indeed the undisclosed real party-in-interest. Section 21.13(a) provides that an applicant must disclose fully real party (or parties)-in-interest to an application, including complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant. The test for determining whether a party is a real party-in-interest is whether that party has an ownership interest in the application or will be in a position, actually or potentially, to control the operation of the station." *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (1974). In addressing the first prong of the real party-in-interest inquiry, there appears to be no evidence that Bruce Merrill has any ownership interest in BFI's applications. *VCI* at 1898. As to the second part of the test, Petitioner argues that Merrill's involvement in the preparation of BFI's applications and the "Letter of Understanding," supports their contention that Merrill is or will be in a position to control station operations. However, we conclude that the evidence presented fails to place Merrill in an actual or potential position to control the operation of BFI's MMDS stations. *VCI* at 1898-1899. Consequently, we cannot find that BFI violated the Commission's real party-in-interest rule.

8. *One-to-a-Market Issue.* The evidence presented is also insufficient to find a violation of the Commission's one-to-a-market rule. The Committee contends that the "Letter of Understanding", standing alone, bestows valuable rights upon Merrill, and consequently constitutes a significant "cognizable interest" in all markets where BFI is an applicant. Further, it is argued that this "cognizable interest" is similar to that of an officer or director. In addition, Petitioner states that Merrill also is a "beneficiary" of this business venture. First, the evidence does not demonstrate that Bruce Merrill holds in BFI an interest similar to that of an officer or director, particularly in light of BFI's rebuttal that neither Bruce Merrill nor MerrillCom has the express or implied authority to make any decisions concerning the operation of BFI's MMDS facilities. Second, as a customer of MMDS licensees, Merrill does stand to benefit, in a broad sense, due to the programming arrangement between BFI and Merrill. However, this "benefit" is no different from that every other customer/programmer BFI will receive. In addition, these letters of understanding represent only a right to negotiate, and

[5] Merrill entered into similar "Letters of Understanding" with all fifteen suspect applicants.

[6] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." Jazz, 775 F.2d at 395.

not, a guarantee of access to BFI facilities. As the Commission found in *VCI*, "Such ordinary customer interests cannot be construed as a "cognizable interest" in an MMDS application for § 21.901(d)(2) purposes." 2 FCC Rcd at 1899. Consequently, we are not persuaded that BFI violated the one-to-a-market rule.

CONCLUSION

9. Based on the foregoing, we find that the Committee's allegations, when read in conjunction with the entire record, are insufficient to raise a substantial and material question of fact regarding real party-in-interest or one-to-a-market rule violations. Moreover, we are not persuaded that the record supports the Committee's contentions that BFI violated the real party-in-interest or one-to-a-market rules.

10. In *VCI*, 2 FCC Rcd at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Virginia Communications Inc., raised questions concerning the applicant's intent to comply with Title II of the Communications Act. *See* 47 U.S.C. § 202(a); *see also* 47 U.S.C. § 201. BFI is reminded that the Commission imposed in *VCI* a condition on any MMDS authorization BFI obtains requiring an offering to the public without unreasonable preference or discrimination for 60 days from the date its formal tariffs are effective. "During that 60 day period, [BFI] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer/programmer." *VCI* at 1900.

ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that the petition filed by the Committee for Fair MDS Lotteries against the application of B. F. Investments, Inc. at Saginaw, Michigan and York, Pennsylvania IS DENIED.

12. This order is issued pursuant to Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. See Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Deputy Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VIDEO/MULTIPOINT, INC. File Nos. 15157-CM-P-83
15184-CM-P-83

For Authority to
Construct and Operate
Multichannel Multipoint Distribution
Service Stations on the F-group
Channels at Richmond, Virginia
and Syracuse, New York

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1992; Released: August 20, 1992

By the Deputy Chief, Domestic Facilities Division:

INTRODUCTION

1. This *Memorandum Opinion and Order* concerns a petition to deny filed against the above-referenced applications of Video/Multipoint, Inc. (hereinafter referred to as Video) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels in the Richmond, Virginia and Syracuse, New York markets. The petition was filed by the Committee for Fair MDS Lotteries (hereinafter referred to as the Committee or as the Petitioner). Video's Richmond and Syracuse MMDS applications were selected for qualification review as the result of Commission lotteries held on December 19, 1985. For the reasons discussed below, we deny Petitioner's request.

ARGUMENTS

2. Generally, the Committee contends that Video and fifteen other MMDS applicants,[1] acting in a coordinated effort and under the direction of Bruce Merrill (Merrill)[2], sought to gain control over both MMDS channel groups in major markets throughout the United States by filing, under different corporate names, virtually identical applications in each of these markets. By doing so, the Petitioner alleges that these sixteen applicants violated the Commission's rules which were designed to ensure that no one applicant have more than one chance in an MMDS lottery, in a given market.[3] Petitioner requests an evidentiary hearing on Video's lottery-winning Richmond and Syracuse applications because, they argue, circumstances surrounding the preparation and filing of these applications raise a substantial and material question of fact as to whether Merrill is the undisclosed real party-in-interest behind Video's applications, in violation of Section 21.13(a)(1) of the Commission's Rules, 47 C.F.R. § 21.13(a)(1). Petitioner further argues that these same circumstances also raise a substantial and material question of fact as to whether Video, filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the "one-to-a-market" rule.[4] The Petitioner submits that the following circumstances raise issues of fact and provide support for their request for an evidentiary hearing:

> (1) Bruce Merrill's alleged involvement in obtaining the financing arrangements for Video and the fifteen other applicants;
>
> (2) Merrill's involvement in the initiation, preparation, payment, and filing of Video's applications, as well as the applications of the other fifteen applicants, and his assistance in the selection of markets by these applicants;
>
> (3) Relationships: Principals of Video, William and Ronna Sauro, are also partners with Marshall M. Carpenter, Jr. and Lyle Mettler in Neighborhood TV Company, Inc. Mr. Carpenter had extensive connections with Merrill at the time the MMDS applications were prepared, and was, in fact, Chief Engineer, of Merrill Communications;

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[1] The fifteen other suspect applicants include B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc.

[2] Bruce Merrill is Chairman of the Board of Directors and 100% shareholder of Merrill Communications, Inc. (MerrillCom). "Merrill" will be used therein to refer to either Bruce Merrill or MerrillCom.

[3] Video's application and the Committee's petition were filed prior to the adoption of Section 21.901(d)(2) which now allows a single operator to acquire a license for both groups of MMDS channels in the same market. *See* Amendment of Part 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Multichannel Multipoint Distribution Service, 5 FCC Rcd 6410 (1990).

[4] At the time the subject applications and the related petition to deny were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of either the same group, or the other group of channels in the same area. 47 C.F.R. § 21.901(d)(2).

(4) Similarities in the articles of incorporation of Video, and articles of incorporation of some of the other applicant corporations;

(5) Technical and other similarities of Video's applications with the "cookie cutter" applications of the other fifteen applicants;

(6) the "Letter of Understanding" between Video and Merrill which provides that Merrill will provide programming services to Video if Video is a successful applicant, in consideration for the pre-filing services performed by Bruce Merrill.[5]

3. In response to Petitioner's allegations, Video states that Bruce Merrill has not controlled Video in the past, and will not control it in the future. Video argues that there is no basis for an evidentiary hearing because the petition to deny is speculative, conclusory, and unsupported by substantive evidence. Further, Video maintains that the Committee's petition contains broad generalizations and inferences that do not give rise to evidence of violations of Commission rules or policies. Video further argues that the record does not support Petitioner's allegations that Video violated the real party-in interest and one-to-a-market rules.

DISCUSSION

4. *Hearing Request.* To obtain an evidentiary hearing, parties challenging an application must satisfy the two-step test established in Section 309(d) of the Communications Act of 1934, as amended. As a threshold matter, Section 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show ... that a grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a prima facie case has been made, then, and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(d)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C. § 309(d)(2). The Court of Appeals for the District of Columbia Circuit has reaffirmed this two-step process for determining the sufficiency of a petition to deny requesting an evidentiary hearing. *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (Astroline); *Gencom, Inc. v. FCC*, 832 F.2d 171, 180, 181 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (Jazz).

5. The Commission's *prima facie* inquiry is limited to consideration of the allegations in the petition to deny and any supporting affidavits. In addition, there is the assumption that the specific facts set forth by the petitioner are true. *Id.* In the instant case, a review of the specific allegations of fact, taken as true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience, and necessity. Proof that Video failed to disclose the real party-in-interest and filed multiple applications would alter the Commission's public interest determination. *See, e.g., David Lausstsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car. Bur. 1988).

6. Having found that the petition comports with the requirements of Section 309(d)(1), we now must determine whether a substantial and material question of fact has been raised by the Petitioner.[6] In making this determination, the Commission is given greater latitude and is permitted to consider the totality of evidence presented (*ie.*, petitioner's evidence, rebuttal evidence, and other matters the Commission may officially notice).

7. *Real Party-in-Interest Issue.* The Committee submits that Merrill's direct and indirect participation in the preparation of the MMDS applications filed by Video suggests that Merrill is indeed the undisclosed real party-in-interest. Section 21.13(a) provides that an applicant must disclose fully real party (or parties)-in-interest to an application, including complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant. The test for determining whether a party is a real party-in-interest is whether that party has an ownership interest in the application or will be in a position, actually or potentially, to control the operation of the station." *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL*, Inc., 49 FCC 2d 962, 964 (1974). In addressing the first prong of the real party-in-interest inquiry, there appears to be no evidence that Bruce Merrill has any ownership interest in Video's applications. *VCI* at 1898. As to the second part of the test, Petitioner argues that Merrill's involvement in the preparation of Video's applications and the "Letter of Understanding," supports their contention that Merrill is or will be in a position to control station operations. However, we conclude that the evidence presented fails to place Merrill in an actual or potential position to control the operation of Video's MMDS stations. *VCI* at 1898-1899. Consequently, we cannot find that Video violated the Commission's real party-in-interest rule.

8. *One-to-a-Market Issue.* The evidence presented is also insufficient to find a violation of the Commission's one-to-a-market rule. The Committee contends that the "Letter of Understanding", standing alone, bestows valuable rights upon Merrill, and consequently constitutes a significant "cognizable interest" in all markets where Video is an applicant. Further, it is argued that this "cognizable interest" is similar to that of an officer or director. In addition, Petitioner states that Merrill also is a "beneficiary" of Video's MMDS business venture. We disagree. First, the evidence does not demonstrate that Bruce Merrill holds in Video an interest similar to that of an officer or director, particularly in light of Video's rebuttal that neither Bruce Merrill nor MerrillCom has the express or implied authority to make any decisions concerning the operation of Video's MMDS facilities. Second, as a customer of MMDS licensees, Merrill does stand to benefit, in a broad sense, due to the programming arrangement between Video and Merrill. However, this "benefit" is no different from that

[5] Merrill entered into similar "Letters of Understanding" with all fifteen suspect applicants.

[6] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." Jazz, 775 F.2d at 395.

every other customer/programmer Video will receive. In addition, these letters of understanding represent only a right to negotiate, and not, a guarantee of access to Video facilities. As the Commission found in *VCI*, "Such ordinary customer interests cannot be construed as a "cognizable interest" in an MMDS application for § 21.901(d)(2) purposes." 2 FCC Rcd at 1899. Consequently, we are not persuaded that Video violated the one-to-a-market rule.

CONCLUSION

9. Based on the foregoing, we find that the Committee's allegations, when read in conjunction with the entire record, are insufficient to raise a substantial and material question of fact, regarding real party-in-interest or one-to-a-market rule violations. Moreover, we are not persuaded that the record supports the Committee's contentions that Video violated the real party-in-interest or one-to-a-market rules.

10. In *VCI*, 2 FCC Rcd at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Virginia Communications Inc., raised questions concerning the applicant's intent to comply with Title II of the Communications Act. *See* 47 U.S.C. § 202(a); *see also* 47 U.S.C. § 201. Video is reminded that the Commission imposed in *VCI* a condition on any MMDS authorization Video obtains requiring an offering to the public without unreasonable preference or discrimination for 60 days from the date its formal tariffs are effective. "During that 60 day period, [Video] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer/programmer." *VCI* at 1900.

ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that the petition filed by the Committee for Fair MDS Lotteries against the application of Video/Multipoint, Inc. at Richmond, Virginia and Syracuse, New York IS DENIED.

12. This order is issued pursuant to Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. See Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Deputy Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MWTV, INC. File No. 10335-CM-P-83
10432-CM-P-83

For Authority to
Construct and Operate
Multichannel Multipoint Distribution
Service Stations on the F-group
Channel at Lincoln, Nebraska
and Youngstown, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1992; Released: August 20, 1992

By the Deputy Chief, Domestic Facilities Division:

INTRODUCTION

1. This *Memorandum Opinion and Order* concerns a petition to deny filed against the above-referenced applications of MWTV, Inc. (hereinafter referred to as MWTV) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels in the Lincoln, Nebraska and Youngstown, Ohio markets. The petition was filed by the Committee for Fair MDS Lotteries (hereinafter referred to as the Committee or as the Petitioner). MWTV's Lincoln and Youngstown MMDS applications were selected for qualification review as the result of Commission lotteries held on March 28, 1986 and May 28, 1986. For the reasons discussed below, we deny Petitioner's request.

ARGUMENTS

2. Generally, the Committee contends that MWTV and fifteen other MMDS applicants,[1] acting in a coordinated effort and under the direction of Bruce Merrill (Merrill)[2], sought to gain control over both MMDS channel groups in major markets throughout the United States by filing, under different corporate names, virtually identical applications in each of these markets. By doing so, the Petitioner alleges that these sixteen applicants violated the Commission's rules which were designed to ensure that no one applicant have more than one chance in an MMDS lottery, in a given market.[3] Petitioner requests an evidentiary hearing on MWTV's lottery-winning Lincoln and Youngstown applications because, they argue, circumstances surrounding the preparation and filing of these applications raise a substantial and material question of fact as to whether Merrill is the undisclosed real party-in-interest behind MWTV's applications, in violation of Section 21.13(a)(1) of the Commission's Rules, 47 C.F.R. § 21.13(a)(1). Petitioner further argues that these same circumstances also raise a substantial and material question of fact as to whether MWTV, filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the "one-to-a-market" rule.[4] The Petitioner submits that the following circumstances raise issues of fact and provide support for their request for an evidentiary hearing:

(1) Bruce Merrill's alleged involvement in obtaining the financing arrangements for MWTV and the fifteen other applicants;

(2) Merrill's involvement in the initiation, preparation, payment, and filing of MWTV's applications, as well as the applications of the other fifteen applicants, and his assistance in the selection of markets by these applicants;

(3) Relationship between principal of MWTV, Marshall M. Carpenter, Jr. and Bruce Merrill. Mr. Carpenter had extensive connections with Merrill at the time the MMDS applications were prepared, and was, in fact, Chief Engineer, of Merrill Communications;

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[1] The fifteen other suspect applicants include B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc.

[2] Bruce Merrill is Chairman of the Board of Directors and 100% shareholder of Merrill Communications, Inc. (MerrillCom). "Merrill" will be used therein to refer to either Bruce Merrill or MerrillCom.

[3] Video's application and the Committee's petition were filed prior to the adoption of Section 21.901(d)(2) which now allows a single operator to acquire a license for both groups of MMDS channels in the same market. *See* Amendment of Part 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Multichannel Multipoint Distribution Service, 5 FCC Rcd 6410 (1990).

[4] At the time the subject applications and the related petition to deny were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of either the same group, or the other group of channels in the same area. 47 C.F.R. § 21.901(d)(2).

(4) Similarities in the articles of incorporation of MWTV, and articles of incorporation of some of the other applicant corporations;

(5) Technical and other similarities of MWTV's applications with the "cookie cutter" applications of the other fifteen applicants;

(6) the "Letter of Understanding" between MWTV and Merrill which provides that Merrill will provide programming services to MWTV if MWTV is a successful applicant, in consideration for the pre-filing services performed by Bruce Merrill.[5]

3. In response to Petitioner's allegations, MWTV states that Bruce Merrill has not controlled MWTV in the past, and will not control it in the future. MWTV argues that there is no basis for an evidentiary hearing because the petition to deny is speculative, conclusory, and unsupported by substantive evidence. Further, MWTV maintains that the Committee's petition contains broad generalizations and inferences that do not give rise to evidence of violations of Commission rules or policies. MWTV further argues that the record does not support Petitioner's allegations that MWTV violated the real party-in-interest and one-to-a-market rules.

DISCUSSION

4. *Hearing Request.* To obtain an evidentiary hearing, parties challenging an application must satisfy the two-step test established in Section 309(d) of the Communications Act of 1934, as amended. As a threshold matter, Section 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show ... that a grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a prima facie case has been made, then, and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(d)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C. § 309(d)(2). The Court of Appeals for the District of Columbia Circuit has reaffirmed this two-step process for determining the sufficiency of a petition to deny requesting an evidentiary hearing. *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (Astroline); *Gencom, Inc. v. FCC*, 832 F.2d 171, 180, 181 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (Jazz).

5. The Commission's *prima facie* inquiry is limited to consideration of the allegations in the petition to deny and any supporting affidavits. In addition, there is the assumption that the specific facts set forth by the petitioner are true. *Id.* In the instant case, a review of the specific allegations of fact, taken as true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience, and necessity. Proof that MWTV failed to disclose the real party-in-interest and filed multiple applications would alter the Commission's public interest determination. *See, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car. Bur. 1988).

6. Having found that the petition comports with the requirements of Section 309(d)(1), we now must determine whether a substantial and material question of fact has been raised by the Petitioner.[6] In making this determination, the Commission is given greater latitude and is permitted to consider the totality of evidence presented (*ie.*, petitioner's evidence, rebuttal evidence, and other matters the Commission may officially notice).

7. *Real Party-in-Interest Issue.* The Committee submits that Merrill's direct and indirect participation in the preparation of the MMDS applications filed by MWTV suggests that Merrill is indeed the undisclosed real party-in-interest. Section 21.13(a) provides that an applicant must disclose fully real party (or parties)-in-interest to an application, including complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant. The test for determining whether a party is a real party-in-interest is whether that party has an ownership interest in the application or will be in a position, actually or potentially, to control the operation of the station." *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL , Inc.*, 49 FCC 2d 962, 964 (1974). In addressing the first prong of the real party-in-interest inquiry, there appears to be no evidence that Bruce Merrill has any ownership interest in MWTV's applications. *VCI* at 1898. As to the second part of the test, Petitioner argues that Merrill's involvement in the preparation of MWTV's applications and the "Letter of Understanding," supports their contention that Merrill is or will be in a position to control station operations. However, we conclude that the evidence presented fails to place Merrill in an actual or potential position to control the operation of MWTV's MMDS stations. *VCI* at 1898-1899. Consequently, we cannot find that MWTV violated the Commission's real party-in-interest rule.

8. *One-to-a-Market Issue.* The evidence presented is also insufficient to find a violation of the Commission's one-to-a-market rule. The Committee contends that the "Letter of Understanding", standing alone, bestows valuable rights upon Merrill, and consequently constitutes a significant "cognizable interest" in all markets where MWTV is an applicant. Further, it is argued that this "cognizable interest" is similar to that of an officer or director. In addition, Petitioner states that Merrill also is a "beneficiary" of MWTV's MMDS business venture. We disagree. First, the evidence does not demonstrate that Bruce Merrill holds in MWTV an interest similar to that of an officer or director, particularly in light of MWTV's rebuttal that neither Bruce Merrill nor MerrillCom has the express or implied authority to make any decisions concerning the operation of MWTV's MMDS facilities. Second, as a customer of MMDS licensees, Merrill does stand to benefit, in a broad sense, due to the programming arrangement between

[5] Merrill entered into similar "Letters of Understanding" with all fifteen suspect applicants.

[6] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." Jazz, 775 F.2d at 395.

MWTV and Merrill. However, this "benefit" is no different from that every other customer/programmer MWTV will receive. In addition, these letters of understanding represent only a right to negotiate, and not, a guarantee of access to MWTV facilities. As the Commission found in *VCI*, "Such ordinary customer interests cannot be construed as a "cognizable interest" in an MMDS application for § 21.901(d)(2) purposes." 2 FCC Rcd at 1899. Consequently, we are not persuaded that MWTV violated the one-to-a-market rule.

CONCLUSION

9. Based on the foregoing, we find that the Committee's allegations, when read in conjunction with the entire record, are insufficient to raise a substantial and material question of fact regarding real party-in-interest or one-to-a-market rule violations. Moreover, we are not persuaded that the record supports the Committee's contentions that MWTV violated the real party-in-interest or one-to-a-market rules.

10. In *VCI*, 2 FCC Rcd at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Virginia Communications Inc., raised questions concerning the applicant's intent to comply with Title II of the Communications Act. *See* 47 U.S.C. § 202(a); *see also* 47 U.S.C. § 201. MWTV is reminded that the Commission imposed in *VCI* a condition on any MMDS authorization MWTV obtains requiring an offering to the public without unreasonable preference or discrimination for 60 days from the date its formal tariffs are effective. "During that 60 day period, [MWTV] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer/programmer." *VCI* at 1900. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that the petition filed by the Committee for Fair MDS Lotteries against the application of MWTV, Inc. at Lincoln, Nebraska and Youngstown, Ohio IS DENIED.

12. This order is issued pursuant to Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. See Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Deputy Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-115

In the Matter of

Revision of Part 22 of the
Commission's rules governing the
Public Mobile Services

ORDER

Adopted: August 13, 1992; Released: August 13, 1992

By the Deputy Chief, Common Carrier Bureau:

1. On August 7, 1992, Telocator and Cellular Telecommunications Industry Association (CTIA) requested an extension of time to file comments in the above-referenced docket.

2. Telocator and CTIA state that the comprehensive scope of the Commission's proposed revision of Part 22 of the rules and procedures governing the Public Mobile Services has created the need for an open Joint Industry Forum on Part 22 (Forum). Telocator and CTIA will jointly sponsor the Forum, which is tentatively scheduled to convene during the week of September 13, 1992. They believe that the Forum will contribute to the Part 22 proceeding by promoting the direct exchange of information and views among participants. Telocator and CTIA therefore request an extension of the comment deadline from August 21, 1992 to October 5, 1992 to allow the mobile common carrier industry to submit more meaningful comments following the Forum.

3. In view of the scope and complexity of the Commission's proposed actions in this proceeding, we believe the Forum will further the public interest by focusing the issues and fostering consensus on otherwise contentious matters. This, we believe, will enhance administrative efficiency in the resolution of the proceeding. Therefore, we will extend the comment filing dates as requested.

4. Accordingly, it is hereby ordered that the dates for filing comments and replies in the above-referenced rulemaking proceeding ARE EXTENDED to October 5, 1992 and November 5, 1992, respectively. We caution, however, that no further extensions are anticipated in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen Levitz
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

LOPEZ RADIO, INC. File No. BPH-860221MO

For Construction Permit
for a New FM Station
on Channel 299B in
Corydon, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 1992; Released: August 21, 1992

By the Commission:

1. In the Memorandum Opinion and Order, *Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989), the Commission denied, in part, a petition for reconsideration filed January 29, 1988 by Lopez Radio, Inc. ("Lopez"). Now before the Commission is a petition for reconsideration ("Petition III") filed by Lopez on August 28, 1989 and responsive pleadings.[1]

2. By letter dated June 4, 1986, the Mass Media Bureau ("Bureau") returned Lopez's application because the original site proposed by Lopez failed by 1.2 km to provide full spacing to the buffer zone of WYHY(FM), Lebanon, Tennessee, in violation of 47 C.F.R. § 73.207. In addition, the Lopez application was returned because the facilities proposed by Lopez exceeded the maximum ERP/HAAT combination permissible under 47 C.F.R. § 73.211 for a Class B station.[2] On June 8, 1986 Lopez filed a petition for reconsideration and request for reinstatement *nunc pro tunc* ("Petition I"). The Bureau, acting pursuant to delegated authority, denied Petition I. *See Corydon Broadcasting Limited* (Hearing Designation Order), 2 FCC Rcd 7521 (M. M. Bur. 1987). On January 29, 1988 Lopez filed a second petition for reconsideration ("Petition II"). The Commission in *Special Markets, supra*, granted Petition II, in part, with respect to the buffer zone requirement and denied Petition II, in part, with respect to the excessive ERP/HAAT combination. Petition II, although submitted as a petition for reconsideration, was in essence an application for review of the Bureau's decision sustaining the prior return of Lopez's application in *Corydon, supra*. Lopez now seeks reconsideration of the Commission's decision on review.

3. Lopez reiterates, as it did in Petition II, that the treatment afforded to it is inconsistent with the Commission's treatment of other applicants similarly situated. In denying Petition II, the Commission pointed out that Lopez proposed an antenna height which exceeds the maximum effective radiated power (ERP)/height above average terrain (HAAT) combination allowed for a Class B station. The Commission went on to state that Section 73.211 is clear and unambiguous that when an applicant proposes an antenna HAAT which exceeds its class maximum, that applicant must propose an ERP at less than its class maximum; Lopez did not follow this directive.

4. To the extent that Lopez's petition continues to argue that its application was treated inconsistent with the Commission's treatment of other applications similarly situated, it is repetitious. However, Lopez now contends that the Commission's decision cannot be reconciled with subsequent Bureau actions in which applications were not dismissed, but were instead allowed to file curative amendments, even though these applications proposed HAATs that were more excessive than the HAAT proposed by Lopez. In support, Lopez cites the following *Hearing Designation Orders: Cynthia Escajeda Cart*, 2 FCC Rcd 4780 (M. M. Bur. 1987); *Catskill Broadcasting Company, A General Partnership*, 3 FCC Rcd 3024 (M. M. Bur. 1988); *Nancy C. Hart*, 4 FCC Rcd 3451 (M. M. Bur. 1989); and *Evelyn Roy Rogers and Morris A. Rogers, d/b/a The Dunlin Group*, 5 FCC Rcd 5477 (M. M. Bur. 1990). For reasons set forth below, the cases cited present no new evidence to indicate that Lopez's application was treated differently than other similarly situated applications.

5. Section 73.211(b)(2) of the rules provides only one method for derating the ERP for applicants utilizing overheight antennas. This approved method utilizes the propagation curves in Figure 1 of 47 C.F.R. § 73.333. As we noted in *Special Markets*, there is some imprecision inherent in manually ascertaining from the Commission's propagation curves the exact radiation value corresponding to the maximum ERP permitted under Section 73.211(b)(2). It is apparent from the proposed reductions in ERP in each of the above cited cases that the applicants in question were attempting to derate pursuant to the method set forth in Section 73.211(b)(2). Thus, while requesting an HAAT that exceeded the maximum allowed for the respective Class, each applicant in those cases, unlike the petitioner, proportionately derated its ERP in an attempt to bring its application into compliance with Section 73.211(b)(2) at the time of filing. Where applicants, such as those in the cited cases, slightly missed the mark (i.e., exceeded the maximum ERP allowed for their antenna height), the minimal nature of those defects could be attributed to the imprecision inherent in manually ascertaining from the propagation curves the maximum ERP allowed. Consequently, in those cases amendments were permitted to correct the minor deficiencies. In the instant case, however, Lopez proposed the maximum ERP for its Class B facility, *i.e.*, 50 kW, and thus made *no* attempt to comply with the rule by derating the ERP, as specified in 47 C.F.R. § 73.211(b)(2), because of its proposed overheight antenna. The defect in Lopez's proposal therefore cannot be attributed to any imprecision inherent in trying to manually ascertain the maximum ERP cor-

[1] These include: (i) an errata and supplement to Petition III filed August 9, 1990 and January 25, 1991, respectively; (ii) oppositions filed by Harrison County Broadcasting Company and by Corydon Broadcasters, Limited on September 8, 1989 and September 12, 1989, respectively; and (iii) a consolidated reply filed by Lopez on September 21, 1989.

[2] Specifically, Lopez proposed an antenna height above average terrain (HAAT) of 152.5 meters with an effective radiated power

responding to the HAAT proposed in its application.[3] The cited cases are therefore distinguishable and afford no basis for reversing the prior decision in this proceeding.

6. Accordingly, IT IS ORDERED, That the petition for reconsideration filed on August 28, 1989 by Lopez Radio, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

(ERP) of 50 kilowatts. The maximum ERP/HAAT combination allowed for a Class B station under 47 C.F.R. § 73.211 is 50 kW/150 meters.

[3] Lopez filed Petition I and a curative amendment reducing its HAAT only after its application had been returned as unacceptable for filing by the Bureau on June 4, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-134

In the Matter of

Price Cap Performance Review
For AT&T

NOTICE OF INQUIRY

Adopted: June 18, 1992; Released: July 17, 1992

Comment Date: August 21, 1992
Reply Comment Date: September 21, 1992

By the Commission:

I. INTRODUCTION

1. With this Notice, we begin the fourth year review of AT&T's performance under price cap regulation. As the Commission stated when it adopted price caps for AT&T in 1989, this review will be a comprehensive examination of the effects of price cap regulation using all available data and information. To begin this inquiry, the Notice summarizes information already collected by the Commission in monitoring the course of AT&T's performance since price cap rates took effect on July 1, 1989, including data on rates, earnings, service quality, and the development of competition in the long distance marketplace. Overall, the data indicate that price cap regulation has worked well, resulting in the lower rates, innovative services, and improved efficiency we sought to achieve. Finally, the Notice establishes a schedule for the submission of additional data, analysis, and comments on AT&T price caps regulation.

II. THE AT&T PRICE CAP PLAN

2. The Commission began development of the AT&T Price Cap Plan in 1987, as part of a fundamental reappraisal of the rate regulation it applies to telecommunications common carriers.[1] The reappraisal was precipitated by the changes that have swept the telecommunications industry in the last few decades, and accelerated since the AT&T Divestiture. Technological advances in computers, fiber optics, microelectronics, and many other areas transformed the capabilities of "plain old telephone service" while expanding the range and quality of new services. In place of the monolithic Bell System, customers may now select their telecommunications equipment and services from hundreds of suppliers offering an ever-expanding menu of choices.

3. In advancing an AT&T Price Cap Plan, the Commission laid the theoretical and empirical foundation for a regulatory regime that would respond to these dramatic changes.[2] Traditional "cost-plus" rate of return regulation focuses on establishing a reasonable limit on the carrier's profits. This approach requires both the carrier and the Commission to engage in a demanding range of operations, including the examination of the carrier's costs, the separation of those costs between the federal and state jurisdictions, the determination that those costs are reasonable, the allocation of costs among individual services, and the determination of a reasonable rate of return upon the invested capital. The limitations and drawbacks of such "cost-plus" regulation include distorted incentives in capital investment, encouragement of cost-shifting when the carrier also participates in more competitive markets, and little incentive to introduce new and innovative services.[3]

4. The Commission has concluded in the past that rate of return regulation does not encourage optimal efficiency. Under traditional rate of return regulation, the carrier's allowed profits are computed from its total invested capital, whether or not the carrier is using capital, labor, operational methods, and pricing in the most efficient manner. To maximize its profits, the company has an incentive to manipulate its inputs of capital and labor, without regard to efficiency, and to adopt strategies for investment and pricing based upon what it expects the regulatory agency might wish, not necessarily what best serves its customers and society.

5. Correcting such unintended results requires elaborate regulatory structures. The direct costs of such regulation for the regulator, the regulated, and the ratepayer are not trivial: the costs of delay and litigation involved in applying these complex structures during periods of rapid change can also be substantial.[4]

6. A price cap plan improves on traditional regulation by creating positive incentives for reasonable rates, innovation, productivity growth, and accurate cost allocation, while reducing regulatory burdens. The plan's method is to control prices directly, rather than indirectly by examining whether levels of expenses, investment, and profits are reasonable.

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[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987) (*Notice);* Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195 (1988) (*Further Notice);* Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) (*AT&T Price Cap Order); modified on recon.* 6 FCC Rcd 665 (1990) (*AT&T Price Cap Reconsideration Order), appeal docketed AT&T v. FCC,* No. 91-1178 (D.C. Cir. April 15, 1991).

[2] The theoretical and legal bases for the FCC's price cap regulation were outlined by J.R. Haring and E.R. Kwerel, in OPP Working Paper No. 22, "Competition Policy in the Post-Equal Access Market," (February 1987) and K.B. Levitz in OPP Working Paper Series No. 23, "Loosening the Ties That Bind: Regulating the Interstate Telecommunications Market for the 1990s" (February 1987).

[3] There is an extensive body of literature examining the effects of rate of return regulation. *See, e.g.,* H. Averch and L. Johnson, "Behavior of the Firm Under Regulatory Constraint," 52 Amer. Econ. Rev. 1052 (1962); 2 A.E. Kahn, The Economics of Regulation, ch. 2 (1971); and K.E. Train, Optimal Regulation, ch. 1 (1991).

[4] An early version of price caps was developed by the British Government to regulate British Telecommunications Plc (BT), which was privatized fully in 1984. Under this plan, the weighted average price of a basket of services could rise by no more

7. For AT&T, the Commission's price cap plan created three service baskets. The division of the services among baskets was designed to discourage cross-subsidization between the baskets while permitting pricing flexibility for more rational rate structures for the services within each basket. Basket 1 includes residential and small business services like ordinary long distance services and optional calling plans for these services. Basket 2 includes inbound 800 services. Basket 3 includes other price cap services used by businesses, such as private line, private network, and various data transmission services and facilities. The Commission directed that the average "price of services in each basket should change annually by no more than the level of inflation in the US economy (as measured by the Gross National Product Price Index or GNP-PI), reduced by an additional productivity factor of 3 percent. This factor represented efficiency growth that the Commission judged was challenging yet achievable, above the 2.5 percent rate of productivity growth achieved historically under rate of return regulation. A Consumer Productivity Dividend (CPD) of 0.5 percent was added to ensure that customers would receive the first benefits of the expected increase of productivity. Under this system, the Commission expected that customers would benefit from this growth in efficiency through lower rates, and in any case would be protected from unreasonable rates.

8. Customers were also protected from large rate shifts by rate bands within the baskets. These bands limit the range within which AT&T may change prices during a year. Typically, the bands limit annual price changes within basket service categories to a range of 5 percent around the change in the overall basket index, with tighter bands for night and weekend rates and the composite residential rate.[5]

9. For its part, AT&T was given the incentive to achieve even higher productivity growth because the Commission simultaneously removed limits upon the carrier's profits. The effect is to simulate incentives similar to those in competitive markets, where higher profits are the rewards for greater efficiency and innovation, while falling profits are the penalty for inefficiency or error. Thus, if AT&T could achieve productivity growth above the 3 percent productivity factor it would be able to retain the higher profits generated by its improved performance. Failure to meet this target would erode earnings, but would not change the schedule of rate reductions for customers. The plan also recognized that some cost changes beyond AT&T's control were not captured by the inflation factor, for example changes in the access rates AT&T pays to local exchange companies. The plan required that these exogenous cost changes be weighted and included in the final formula for computing each basket's caps.

10. The decision to adopt the AT&T price cap plan reflected no conclusions about the state of the interexchange telephone marketplace. The advantages of improved incentives and simplified methods of achieving reasonable rates alone justified these regulatory reforms. The price plans were, however, well suited to be transitional steps to even simpler regulatory frameworks that did recognize the presence and positive effects of competition. Thus, in CC Docket No. 90-132,[6] the Commission concluded that the state of competition in the interexchange marketplace warranted reduced regulation of AT&T's business services. Streamlined regulation was adopted for the Basket 3 services (except for analog private line) and for most services not regulated under price caps.[7] The Commission also decided that Basket 2's inbound 800 services should become subject to streamlined regulation when the technology for 800 number portability is deployed. Streamlining of Basket 3 services took effect in October, 1991. 800 number portability and streamlining of Basket 2 will occur in the first half of 1993.

11. An integral part of the price cap plan is a periodic review of the results to assure that the plan is functioning as intended. Monitoring and review of AT&T's price cap performance was judged necessary to assure that this regulatory structure functions as intended and in accordance with the Communications Act. The Commission therefore adopted a program combining ongoing monitoring with a formal review of the price cap plan to begin before the end of the third year of price caps, and to be concluded during the fourth year. This review was expected "to consist of a comprehensive examination of the effects of price cap regulation, and [would] consider all available measures of market and carrier performance, including, but not limited to, actual prices, achieved rate of return, quality of service, and technological progressiveness."[8] In evaluating changes to the plan such as the productivity factor, the Commission promised "we will endeavor to ensure that the magnitude of the adjustment does not recreate disincentives to further productivity gains."[9]

12. In this Notice, three years later, we undertake our promised review of the plan's performance and of the need for any adjustments or revisions to the plan. We also present preliminary data gathered during our monitoring of the plan's operation and AT&T's performance. Final data on the first three years of price caps, including final

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than the increase in an index of retail prices, reduced by the so-called "X" factor of 3 percent. For example, if inflation was 5 percent, the basket price could rise by no more than 2 percent. *See* I.M. Stelzer, "Regulating Telecommunications In Britain: A New Alternative of the U.S. Approach," *Telematics*, Vol. 3, No. 9 (September 1986). These price controls were adopted for 5 years. Upon review of the program with BT in 1988, the Director General of the Office of Telecommunications extended the plan for 4 years, with an X factor to 4.5 percent, and modified other provisions. In 1990 the overall X factor was moved to 6.25 percent. OFTEL, The Regulation of BT's Prices: A Consultative Document, p. 6 (January 1992). OFTEL has recently proposed a 7.5 percent factor to begin on August 1, 1993. OFTEL Press Notice, June 9, 1992.

[5] Section 61.47 of the Commission's Rules, 47 C.F.R. Section 61.47.

[6] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990), Report and Order, 6 FCC Rcd 5880 (1991) (*IXC Rulemaking), modified on recon*, 7 FCC Rcd 2677(1992).

[7] Services excluded from price caps are: special construction services; AT&T's Tariff 11, Tariff 12, and Tariff 16 services; services subject to below-the-line accounting; international private line and record carrier services; contract-based and custom services; certain promotional offerings; and services removed from price caps in the IXC Rulemaking, Docket No. 90-132; and any other services specified by the Commission. Section 61.42(c) of the Commission's Rules, 47 C.F.R. Section 61.42(c).

[8] *AT&T Price Cap Order*, 4 FCC Rcd at 3143.

[9] *Id.*

prices, will not be available until after the period closes. We will publish a more complete report of AT&T's performance when those data become available.

III. EXPERIENCE UNDER THE AT&T PRICE CAP PLAN

13. When this Commission adopted price caps in 1989, it was a reshaping of traditional public utility regulation. Now, three years later, price cap and other types of incentive regulation have virtually become the norm.[10] Moreover, the Commission's experience with price caps has been positive. Our experience with the AT&T price cap plan, as described in more detail below, supports the conclusion that price caps appear to have achieved the goals of reasonable rates, effective incentives for efficiency and innovation, and reduced regulatory burdens.

14. The transition from rate of return regulation was accomplished smoothly on July 1, 1989, when AT&T's first price cap tariffs took effect. Customers saw no changes in their services or facilities, but did enjoy significant rate reductions. In the three years since, numerous AT&T tariff filings have been made adjusting rates and introducing services under the simplified, streamlined approach established by the plan, without appearing to compromise the Commission's ability to review these tariffs. AT&T has not sought revision of the plan on grounds that it has been forced into unreasonably low rates, while customers have enjoyed overall rate reductions and a wider choice of service offerings.

15. These benefits occurred while the national economy was weak. Price caps shifts the focus of ratemaking from the individual carrier's costs to national economic trends and Commission-designated efficiency targets. During the first year of price caps, from July, 1989 through June, 1990, the national economy experienced relatively slow economic growth and moderate inflation. Real Gross Domestic Product (GDP) increased 1.4 percent. The economy moved into recession in the last half of 1990, with falling production of goods and services and increased unemployment. The recession appeared to bottom-out in early 1991, but recovery was sluggish and output remained below mid-1990 levels. Positive signs of slow recovery continued in early 1992. Overall, during the first two and a half years of price caps, national output increased very slightly, an average of 0.3 percent per year. Inflation throughout the period was relatively stable; as measured by Gross National Product Price Index (GNP-PI), prices rose about 10 percent, or about 4.5 percent annually.[11]

16. Interstate long distance calling was affected by the sluggish economy but stood out as a relatively strong growth sector. Interstate switched access minutes of use grew by 13.3 percent in 1989, 11.1 percent in 1990, and 6.3 percent in 1991. Overall, switched access minutes of use grew from 244.7 billion in 1988 to 327.1 billion in 1991.[12]

A. Prices

17. During the first three years of price caps, AT&T's rates in all three price cap baskets have remained below the price cap limits. *Appendix, Chart 1.* Because the price cap formula requires that real prices be reduced by 3 percent per year, after adjustment for exogenous cost changes, the plan has achieved its goal of lower rates in real terms. Indeed, despite the economic recession and overall 10 percent increase in general prices during this period, rates for residential customers fell by 4.4 percent. *Appendix, Chart 2.* Rates also fell substantially in other parts of Basket 1 as well as in Baskets 2 and 3.

18. These lower rates produced substantial consumer benefits. Because AT&T's prices never exceeded the caps, customers received the full amount of the CPD, a consumer benefit totalling $533 million over the three year period. In fact, AT&T priced below the cap throughout this period, primarily in Baskets 2 and 3; these additional benefits totalled $668 million. Taken together, the consumer benefits from the CPD and below-cap pricing thus total $1.2 billion to date. *Appendix, Chart 3.*

19. AT&T has proposed no above-band rates to date. However, AT&T has made 12 filings proposing below-band rates. The price cap plan permits AT&T to make below-band filings, thus offering even lower rates to customers, but requires that these filings be supported by a showing that the rates recover average variable costs and thus are not likely to be anticompetitive. In one case the filing was initially rejected for defects in the required cost showing; AT&T corrected its study and the reduced rates were allowed to take effect.[13] In all other cases, the below-band rates as supported by the average variable cost studies were allowed to take effect without rejection, suspension, or investigation.

B. Earnings

20. AT&T's earnings during this period were somewhat higher on average than in earlier periods. In its annual price caps earnings monitoring reports, AT&T computes returns of 11.0 percent for 1989, 13.7 percent for 1990, and 13.4 percent for 1991. The cumulative interstate rate of return under price caps, from July 1, 1989 through December 31, 1991, was 13.2 percent. *Appendix, Chart 4.* This compares to the last rate of return prescribed for AT&T of 12.0 percent and the most recent rate or return prescribed for local exchange companies in 1990 of 11.25 percent.

C. Infrastructure

21. Growth in the volume and variety of telecommunications services requires adequate investment to increase and improve telecommunications facilities. In the price cap rulemaking, some commenters expressed concern that AT&T would pursue short-term profits over long-term investment, leading to deterioration of the interexchange network.

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[10] This Commission adopted a modified price cap plan for the interstate services of local exchange telephone companies in 1990 that now covers over 90 percent of interstate traffic and revenues. Public service commissions in 13 states have adopted price cap plans for intrastate long distance services, while most others have either deregulated rates or allowed increased rate flexibility. Few states continue to practice traditional rate of return earnings regulation.

[11] U.S. Department of Commerce, Survey of Current Business, March 1992.

[12] FCC Report on *Long Distance Market Shares: Fourth Quarter 1991*, p. 5, Table 1.

[13] AT&T Communications, Revisions to Tariff F.C.C. No. 9, 4 FCC Rcd 8466 (1989), AT&T Transmittal No. 2043, filed January 18, 1990.

22. In fact, AT&T has expanded and modernized its network. According to the blanket facilities authorization AT&T must request annually, its domestic in-service circuits have grown from 1.595 million in 1988, the year before price caps was adopted, to 1.777 in 1990 and a projected 1.812 million in 1992.[14] *Appendix, Chart 5.* Moreover, AT&T has simultaneously engaged in a rapid technological upgrade of its network, replacing analog and microwave radio facilities with digital and fiber optic circuits. Under price caps, AT&T increased its fiber optic cable mileage by 63 percent, from 704,731 in 1988 to 1,146,924 in 1991. AT&T has also implemented a new dynamic call routing technology that is projected to increase network efficiency.

23. In the facilities review and authorization process, the Common Carrier Bureau has identified several concerns for which additional information is being sought to monitor AT&T's infrastructure. For example, reported in-service facilities initially dropped in 1990, a period when AT&T was converting analog facilities to digital, before increasing again in 1991.[15] The information obtained by the Bureau should be useful in this proceeding.

D. New Services

24. AT&T introduced 77 new services into the price cap baskets between July 1, 1989 and March 1, 1992. Some of these services bring significant new capabilities to customers using AT&T's network. For example, Dual Party Relay[16] permits hearing and speech-impaired customers who use a Telecommunications Device for the Deaf (TDD) to communicate with hearing persons who do not use a TDD. Its Alternate Number Translation option[17] provides customers with an optional back-up database to improve the reliability 800 and 900 number service calling. More recently, AT&T has proposed a new service that would, for the first time, offer customers a portable long distance number with a package of features for forwarding and routing calls.[18] Other new services present new rate choices for customers, who gain more options in customizing their service programs. For example, a customer may choose to receive rate discounts in return for minimum term and revenue commitments.[19]

E. Service Quality and Network Reliability

25. In the AT&T price cap orders, the Commission examined the question of whether price cap regulation might create unintended incentives for AT&T to permit the telephone network to deteriorate. The concern was that AT&T might pursue short term profits at the expense of maintaining facilities and making needed investment. We concluded that this was generally unlikely because of constraints upon AT&T's ability to succeed in such a strategy, including state and federal monitoring, the tariff review and complaint processes, and competition from alternative suppliers of long distance service. We retained existing monitoring programs and reports and directed the Common Carrier Bureau to specify disaggregated reporting requirements to more closely monitor areas where AT&T is subject to less facilities-based competition.[20]

26. The Commission requires AT&T to file reports semi-annually tracking its performance on service quality indexes measuring the frequency of call blocking. The index was set at 100 for the base period preceding price caps, the first half of 1989. A higher index number indicates a higher percentage of calls blocked in comparison with the base period. For example, a 10-point increase in this index would mean that an additional 0.1 percent of calls were blocked than in the base period. The figures are reported both for blockage associated with AT&T's network and blockage caused by all factors, including blockage attributable to the facilities of local exchange companies terminating AT&T long distance calls.

27. These reports show blockage slightly above the base period for AT&T's network in all five semi-annual reports, but blockage appears to be declining toward the original levels. *Appendix, Chart 6.* The highest blockage was in the second half of 1989, which AT&T attributes to the disruptions of Hurricane Hugo in September, 1989 and the earthquake in the San Francisco area in October, 1989.

28. AT&T's network reliability under price caps has also become a matter of growing concern in the past three years, largely because of a series of major service outages on AT&T's network. These included: a software problem in January, 1990 that led to the blocking of more than 60 million call attempts nationwide;[21] a fiber optic cable cut in Newark, New Jersey on January 4, 1991;[22] the failure of a central office switch in Manhattan, which blocked over 5 million calls and disrupted air traffic control in much of the Northeastern United States;[23] and an outage at a facility in Blackstone, Massachusetts which blocked over 1 million calls and disrupted air traffic control at Boston's Logan Airport.[24]

29. The Commission has thoroughly investigated each of these outages.[25] The causes or set of causes were different in each case. None appeared to be directly traceable to price cap regulation or to any AT&T strategy to maximize short-term profit. The FCC report following each outage recommended specific steps to prevent a recurrence. Nevertheless, the assurance of reliable service to the American public, especially where the public health and safety are at stake, is a matter of the highest priority to this Commission. We have already appointed a blue-ribbon advisory panel, the Network Reliability Council, to examine all issues involving network reliability for the entire tele-

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[14] *Compare* American Telephone and Telegraph Company, File No. W-P-C-6441, Order and Authorization, released July 27, 1990, Appendix B (1990 AT&T Blanket Order) and American Telephone and Telegraph Company, File No. W-P-C-6639, Order and Authorization, released October 23, 1991, Appendix B (1991 AT&T Blanket Authorization), *with* Application of American Telephone and Telegraph Company, W-P-C-6763, filed December 9, 1991, p. 3.

[15] *1991 AT&T Blanket Authorization*, p. 5-7.

[16] Transmittal No. 2763.

[17] Transmittal No. 2640.

[18] EasyReach Service, AT&T Transmittal No. 4041, filed April 28, 1992, effective May 26, 1992.

[19] *See, e.g.*, Transmittal Nos. 2899 and 3031.

[20] *AT&T Price Cap Order*, 4 FCC Rcd at 2951-57.

[21] Report by Chief, Common Carrier Bureau to the Chairman, January 15, 1990.

[22] Report by the Common Carrier Bureau on the January 4, 1991 AT&T Northeast Disruption.

[23] Preliminary Report by the Common Carrier Bureau on the September 17, 1991 AT&T NYC Power Outage Network Disruption.

[24] Report by the Common Carrier Bureau on the November 5, 1991 AT&T Service Outage at Blackstone, Massachusetts.

[25] *See* fns. 21-24, *supra*.

communications industry. We expect the Council's investigation and reports will identify cost-effective ways of improving network reliability, such as identifying industry-best practices.

30. The Inquiry we begin today offers a full opportunity for the Commission, assisted by the views of commenters, to consider whether we should take additional steps to assure that AT&T's service quality and network reliability remains at the highest level.

G. The Interexchange Marketplace

31. During the first two and a half years of price caps, AT&T's share of interstate traffic first has declined, although it has recovered a portion of that lost share recently. In the second quarter of 1989, AT&T's last quarter under rate of return regulation, AT&T registered a 64.8 percent share of interstate minutes. Its market share first declined to 62.0 percent in the second quarter of 1990, but has since stayed within a range from 61.8 to 62.8 percent each quarter. FCC Report, *Long Distance Market Shares: Fourth Quarter, 1991*, released March 24, 1992. *See also, Appendix, Charts 7-9.*

IV. ISSUES ON WHICH INFORMATION AND COMMENTS ARE REQUESTED

32. As we indicated in the original AT&T price cap order, this review will be comprehensive. Parties should submit all data, information, and analysis relevant to AT&T's performance under price cap regulation. Commenters are of course free to propose any changes they believe will improve the price cap plan. However, we emphasize that the goals of price caps are likely to remain unchanged: greater efficiency and innovation; reasonable rates; state-of-the-art service quality; improvement in consumer welfare; and the minimal regulatory burden required to achieve these other objectives. We do not anticipate reimposing rate of return regulation or making any adjustments to price cap regulation that would reduce the incentives the price cap plan creates. Thus, any proposed modifications should be designed to enhance the plan's ability to achieve the original goals.

33. We also solicit comment on the following issues for inquiry:

Issue 1. Should the AT&T price cap regulations be continued after June, 1993?

Issue background: Our monitoring of AT&T's performance under price caps indicates that the basic structure of the AT&T price cap regulation plan has produced substantial benefits to consumers. We request information and comments on this statement. We also request comments on the schedule for the next comprehensive review.

Issue 2. Should the formulas for computing AT&T's price cap indices be changed?

Issue background: The current formulas for computing the Price Cap Indices use GNP-PI as the measure of inflation, a productivity factor, and adjustments for certain exogenous cost changes. The Actual Price Indexes are computed using the demand in the base year and the change in prices. We request comments and information addressing changes in these formulas that would better achieve the goals of the price cap plan.

Issue 3: Should the productivity factor used to compute the AT&T price cap indices be changed? In addition or in the alternative, should a one-time change in AT&T's price cap index be required?

Issue background: The present AT&T productivity factor is 3.0 percent per year, including a Consumer Productivity Dividend of 0.5 percent. We request information and comments on whether this factor should be changed. An alternative method of adjusting AT&T's rates in order to increase the benefits to customers would be a one-time adjustment in rates. We request information and comments on whether either or both of these adjustments is warranted.

Issue 4: Should the Commission increase monitoring of AT&T's network reliability and service quality?

Issue background: In addition to monitoring the efforts of the Network Reliability Council, we also are requesting additional information from AT&T regarding its service quality. Commenters are requested to submit data, information, and proposals in this inquiry that in their view will contribute to assuring state-of-the-art reliability and service quality for AT&T.

Issue 5: Should the Commission change AT&T's Basket 1?

Issue background: With the removal of most of Basket 3 and the scheduled removal of Basket 2 from price caps, the price cap plan will apply essentially to Basket 1 residential and small business services. These changes in the operation of the plan, as well as other considerations, might support closer examination of the composition of Basket 1.[26]

V. ADDITIONAL INFORMATION

34. The Commission is continuing to monitor AT&T's performance and to gather data, particularly data through the third year of price caps, which ends June 30, 1992. Commenters are requested to assist us by submitting any relevant information they may possess. This information should be as specific and quantitative as possible. General claims without the support of the best available hard data and relevant analysis is likely to receive little weight in this inquiry.

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[26] One possible area for revision could be the composition of the residential basket. This basket now includes the AT&T ReachOut services, optional long distance calling plans that offer discounts or blocks of calling time in exchange for fixed monthly charges. These plans are designed to attract relatively frequent callers, those for whom the discounts reduce bills more than the monthly charge increases them.

These plans have received a large share of the rate reductions in Basket 1, perhaps because the level of competition and marketing directed at these customers puts more downward pressure on these rates than on the standard long distance schedules for which ReachOut is a substitute. The removal of ReachOut from Basket 1 might well help target productivity gains to the standard schedules, while permitting ReachOut customers to continue to benefit both from competitive choices and the opportunity to use the substitute long distance services that would remain in the Basket.

35. AT&T, of course, has unique access to information regarding its interstate operations and facilities. We believe that a comprehensive review of price cap performance, especially as it involves the key issue of whether to modify the current rate levels or productivity factor for the residential and small business services in Basket 1, requires the submission and examination of cost data that demonstrate AT&T's performance in providing those services under price caps. Such data could also help us evaluate a reasonable productivity standard for the future. Aggregate performance measures for all of AT&T's interstate services, including non-price cap services, will not necessarily correspond to the results or prospects for Basket 1 services. Thus, we require AT&T to furnish this additional information as part of our review.

36. Furthermore, given the importance of maintaining and improving network infrastructure, we also direct AT&T to submit additional information regarding its activities and performance in maintaining and improving service quality. This information shall include a complete explanation of factors affecting the service quality index under price caps.

VI. SCHEDULE FOR SUBMISSION OF INFORMATION, COMMENTS, AND REPLIES

37. This review will be conducted as a notice of inquiry proceeding. *See* 47 C.F.R Section 1.430. *Ex parte* comments will be permitted. *See* 47 C.F.R. Section 1.1204(a)(4).

38. In the past, we have required that parties and commenters submit multiple written copies of their submissions for use by the Commission staff and for inclusion in the public docket file. We believe that submission of data and comments in the form of computer diskettes that can be assembled into data bases would assist both the Commission and the public in evaluating the information submitted in this inquiry. Such a data base would then be available for our use in preparing our report and a separate read-only data base could be made available to members of the public wishing to keep abreast of the record in this proceeding.

39. To create this valuable data base, we request that all commenters submit their comments and submissions of data and information in this proceeding in the form of computer diskettes. These should be IBM PC-compatible, with text files compatible with WordPerfect 5.1 software and spreadsheets compatible with Lotus 1-2-3, the configuration of most Commission PCs. For the purposes of this proceeding commenters should also submit the paper copies required by rule. We will accept comments filed only on paper, but strongly encourage commenters to also submit their filings on diskettes. We also encourage commenters to comment on and suggest improvements to the procedures we now adopt to create data bases to organize and analyze the information to be gathered in this inquiry.

40. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

VII. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN OF the inquiry described above and that COMMENT IS SOUGHT on these issues.

42. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.430, 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.430, 1.415, and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before **August 21, 1992,** and reply comments SHALL BE FILED with the Secretary on or before **September 21, 1992.** To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleading with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, Downtown Copy Center, 1990 M St. N.W., Room 640, Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room, Room 239, 1919 M Street N.W., Washington, D.C. 20554.

43. IT IS FURTHER ORDERED that AT&T Communications, Inc. SHALL FILE information and data reporting its total revenues, total expenses and taxes, net earnings, rate base, and rate of return for its Basket 1 services for each of the first three years of AT&T price caps and overall, including data showing: the effects associated with changes in depreciation rates granted by the Commission and taking effect within this period; changes in accounting treatment for employee post-retirement benefits; and expenses associated with employee early retirement plans. AT&T is directed to explain each step of how it computes this data and any other data or adjustments it considers relevant to assessing its earnings and performance in providing Basket 1 and other price cap services. AT&T is also directed to submit full information identifying its activities and the factors affecting its service quality under price caps, including all factors affecting its service quality indexes. AT&T is directed to submit this data to the Secretary of the Commission no later than July 31, 1992, in the same manner as other comments in this proceeding.

44. IT IS FURTHER ORDERED that this proceeding will also be a test of methods to improve Commission notice and comment procedures through computer-based filing and docket management approaches. The Commission directs the Chief, Common Carrier Bureau to issue notices and orders necessary to implement this test. We also request the views of interested parties on ways to use computers to improve filing procedures as part of the comment in this proceeding. The Commission strongly urges interested parties to participate in this test.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Chart 1

AT&T's Price Caps Indices

by Basket and Band

(June 30, 1989 – July 1, 1992)

Index by Basket and Band	June 30, 1989 *	July 1, 1990			July 1, 1991			July 1, 1992 ****		
	Index	Upper Band	Index	Lower Band	Upper Band	Index	Lower Band	Upper Band	Index	Lower Band
Basket 1										
Price Caps Index	96.6	--	94.3	--	--	94.1	--	--	94.3	--
Actual Price Index	98.4	--	94.3	--	--	93.6	--	--	94.3	--
Residential Index	98.8	95.5	94.5	--	95.5	94.1		95.4	94.5	--
Service Band Indices :										
Day	95.7	95.5	91.8	86.3	94.2	89.2	85.2	96.4	91.9	87.2
Evening	99.5	98.8	91.4	90.1	94.5	90.9	86.4	93.3	89.8	85.2
Night/Weekend	99.6	102.4	99.9	93.4	106.3	102.2	97.1	106.1	102.2	97.0
International	99.2	98.3	94.6	88.8	99.4	94.5	89.9	99.3	94.7	89.8
Operator and Card	98.6	100.6	98.7	90.9	103.9	96.4	94.0	104.5	99.6	94.5
Reach Out America	97.1	94.6	88.5	85.5	93.2	88.4	84.4	90.8	86.6	82.1
Basket 2										
Price Caps Index	96.8	--	94.0	--	--	93.8	--	--	94.0	--
Actual Price Index	97.3	--	92.8	--	--	93.4	--	--	93.9	--
Service Band Indices:										
AT&T 800	98.4	98.3	94.7	88.8	100.4	95.3	90.8	96.9	92.5	87.7
Directory 800 **	--	--	--	--	103.3	100.0	95.3	106.5	103.6	98.2
MEGACOM 800	92.3	88.5	85.3	80.0	90.4	85.8	81.8	92.1	87.9	83.4
Other 800	100.0	96.3	90.0	87.0	93.7	89.0	84.8	93.3	89.0	84.4
READYLINE 800	96.5	93.9	90.2	84.8	96.0	91.1	86.8	98.6	94.1	89.2
Former Basket 3 * **										
Price Caps Index	98.3	--	96.7	--	--	97.3	--	--	--	--
Actual Price Index	96.9	--	93.1	--	--	95.9	--	--	--	--
Service Band Indices :										
AT&T WATS	94.8	99.2	94.7	89.8	104.9	99.0	94.9	--	--	--
MEGACOM	92.8	92.9	88.6	84.0	95.7	90.4	86.6	--	--	--
Other Switched	100.2	104.2	99.0	94.3	102.9	97.1	93.1	--	--	--
Other Private Line	99.2	79.8	76.1	72.2	83.1	78.3	75.2	--	--	--
PRO WATS	96.1	95.8	91.1	86.7	98.3	92.8	88.9	--	--	--
SDN	81.9	80.7	76.8	73.0	82.0	77.8	74.2	--	--	--
Voice Grade Private Line	101.2	103.0	98.1	93.2	108.9	102.8	98.5	--	--	--
Restructured Basket 3 * **										
Price Caps Index	--	--	--	--	--	--	--	--	103.2	--
Actual Price Index	--	--	--	--	--	--	--	--	97.9	--

Source: FCC, Common Carrier Bureau, Tariff Division.

* The values of indices on June 30, 1989 are those that immediately preceded price caps regulation: Indices were initiated at 100.0 on December 31, 1988 and price caps regulation began on July 1, 1989.

** The Directory 800 band was added to price caps regulation on July 1, 1991.

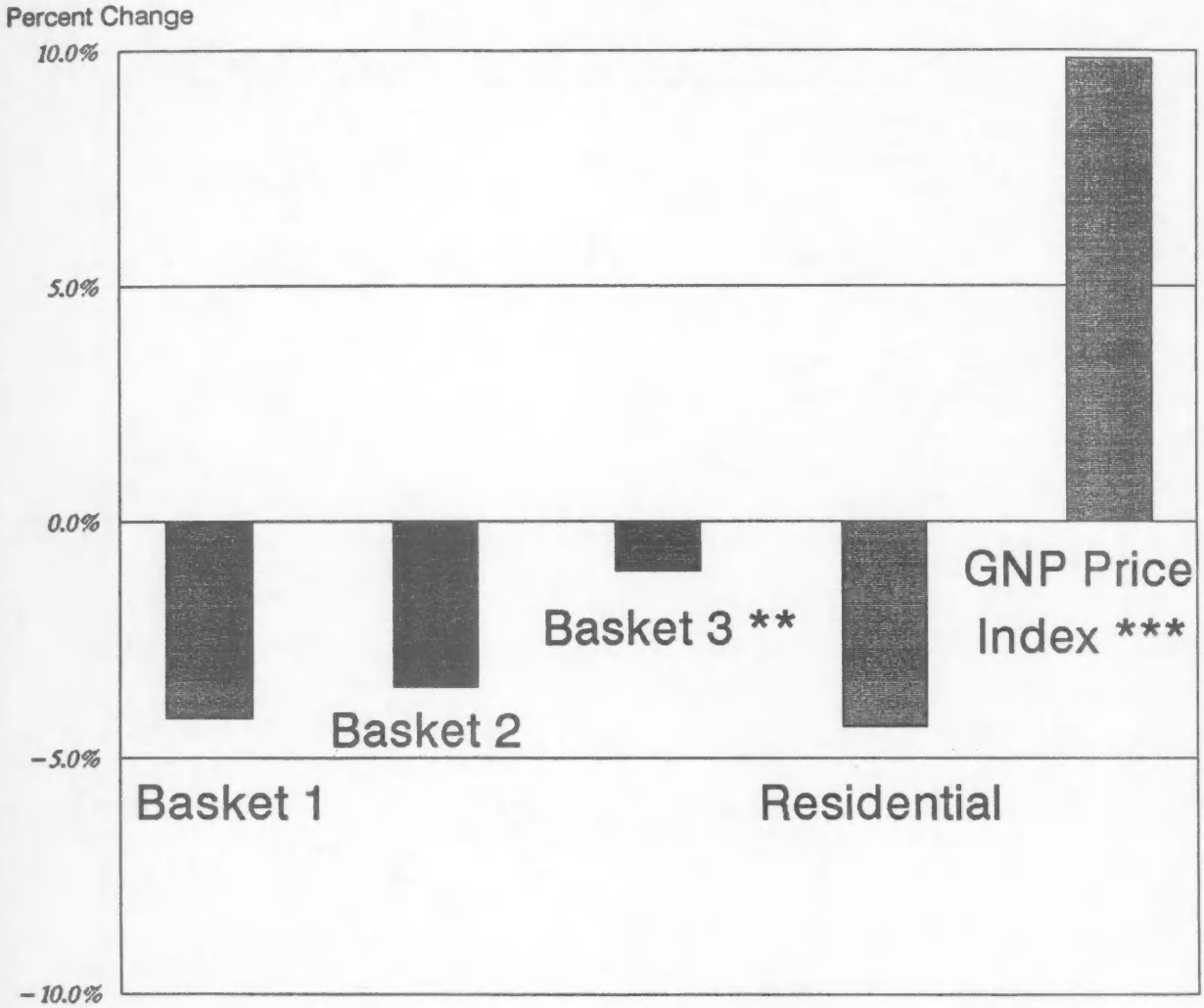
*** Basket 3 indices were reinitiated to 100.0 on August 1, 1991, when Basket 3 was restructured to include only private-line-analog services.

**** July 1, 1992 values are preliminary values from AT&T's annual price cap filing, and are subject to change. These values are based on a May 15, 1992 letter from AT&T to the FCC Secretary, pursuant to Sections 61.41 through 61.49 of the Commission's Rules, 47 C.F.R.

Chart 2

Comparison of Change in AT&T's Price Indices * to Change in GNP Price Index

July 1, 1989 – June 30, 1992



Sources: Chart 1 except for the GNP Price Index (GNP–PI). The GNP–PI is from the Bureau of Economic Analysis, Department of Commerce, Survey of Current Business, various volumes.

* Price indices are the Actual Price Index (API) in each basket and the Basket 1 Residential Index.

** Represents change over two years ending June 30, 1991. An abbreviated period is shown, because most services in Basket 3 were removed from price caps in November 1991.

*** Represents change over two 1/2 years beginning 3rd Quarter 1989 and ending 1st Quarter 1992. An abbreviated period is used, because GNP–PI data is not yet available beyond 1st Quarter 1992.

Chart 3

Consumer Benefits from Below–Caps Pricing and Consumer Dividends

(Millions of Dollars)

Row	Item	1st Price Caps Year	2nd Price Caps Year	3rd Price Caps Year	Total **
1.	Amount by which AT&T has exceeded regulatory requirements by pricing below the cap	$258	$205	$205	$668
2.	Consumer Productivity Dividend	$85	$179	$269	$533
3.	TOTAL CONSUMER BENEFIT *	$343	$384	$474	$1,201

Source: FCC, Common Carrier Bureau, Tariff Division.

* Equals Row 1 plus Row 2.

** Equals the sum of the years.

Notes:

1st Price Caps Year is December 31, 1988 through July 1, 1989.
2nd Price Caps Year is July 2, 1989 through July 1, 1990.
3rd Price Caps Year is July 2, 1990 through July 1, 1991.

Chart 4

AT&T's Interstate Rate of Return

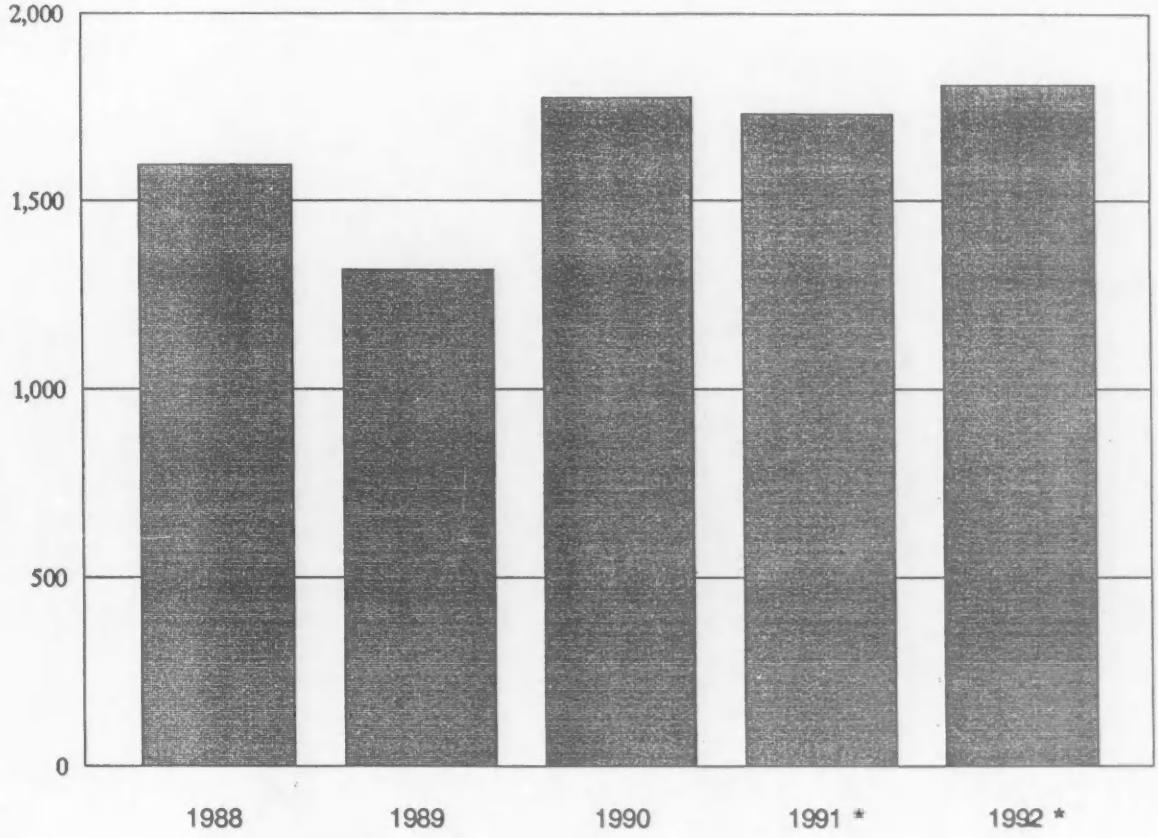
(Thousands of Dollars)

Row	Item	1989	1990	1991
1	Total Revenues	$25,945,517	$25,204,356	$25,672,542
2	Total Expense & Taxes	$24,719,988	$23,666,092	$24,177,121
3	Net Earnings	$1,225,529	$1,538,264	$1,495,420
4	Rate Base (Avg. Net Investment)	$11,145,915	$11,207,433	$11,151,312
5	Rate of Return (Percent)	11.00%	13.73%	13.41%

Source: FCC, Common Carrier Bureau, AT&T's Interstate Rate of Return Report, 1991, 1990, 1989.
Notes:
Row 3: Row 1 minus Row 2.
Row 5: Row 3 divided by Row 4.

Chart 5

AT&T's Circuit Counts



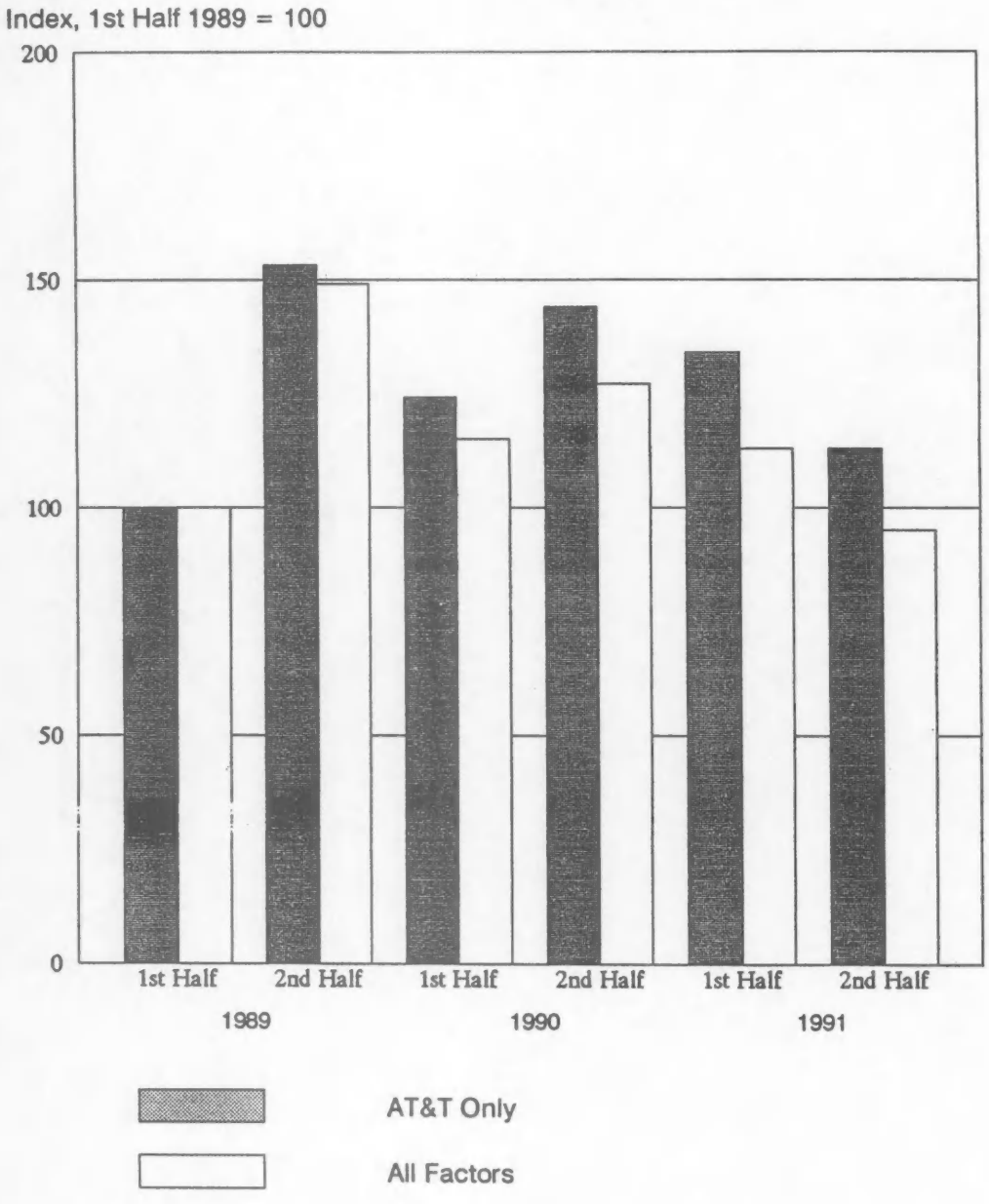
Source: FCC, Common Carrier Bureau, Domestic Facilities Division.

* Estimate.

Chart 6

AT&T's
Equipment Blockage and Failure Index

(1989–1991)

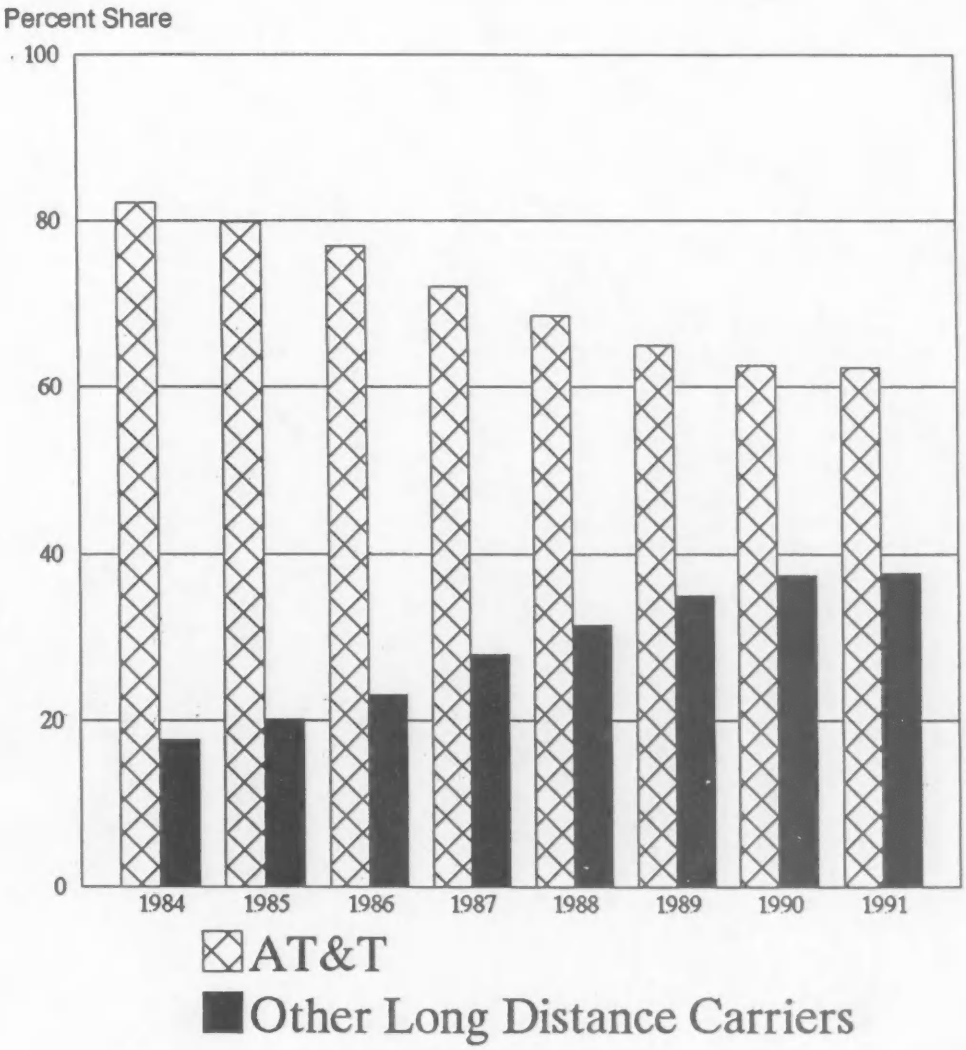


Source: FCC, Common Carrier Bureau, Industry Analysis Division.

Chart 7

AT&T's Market Share
Interstate Switched Minutes of Use

(1984 – 1991)*



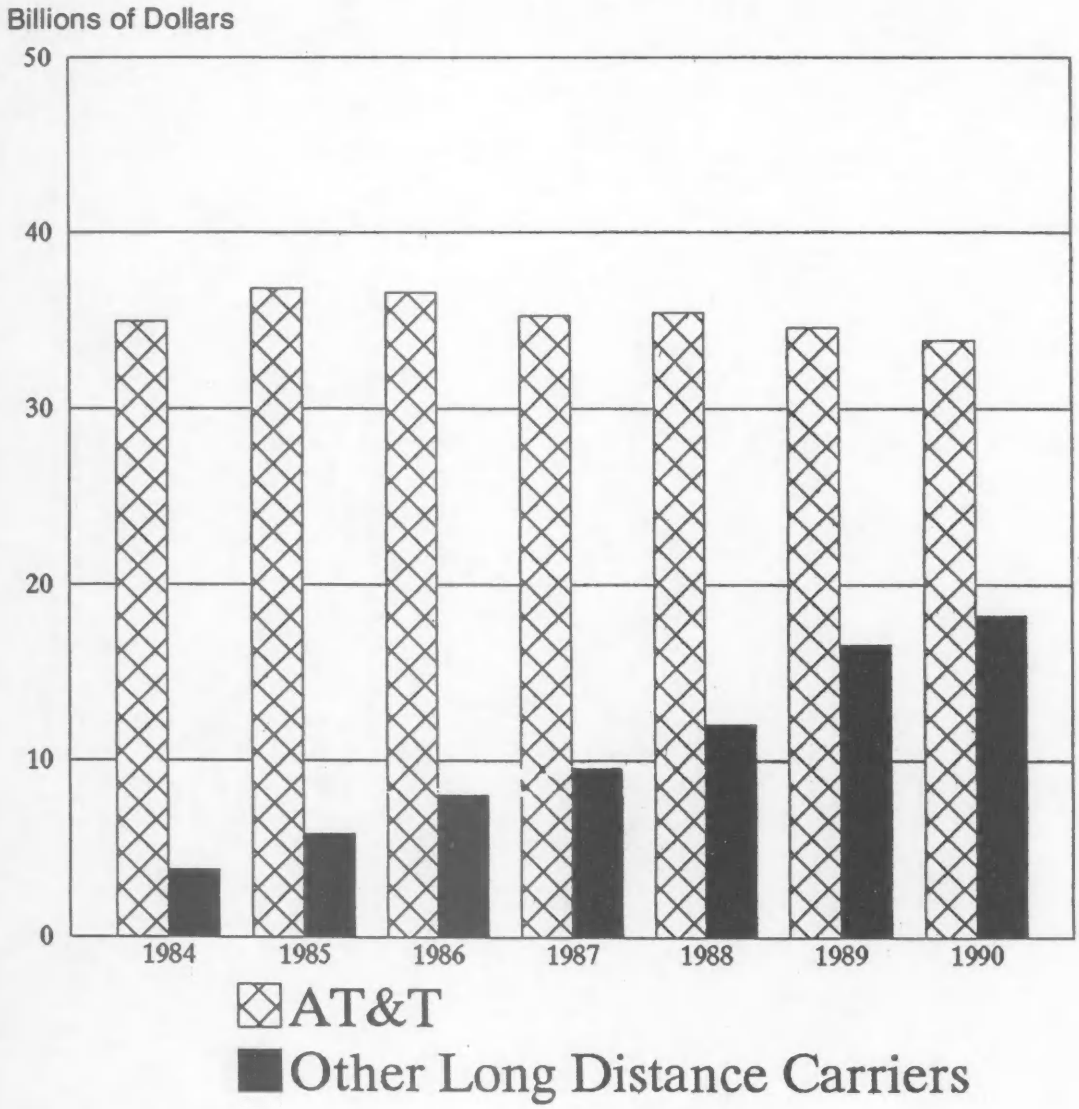
Source: FCC, Common Carrier Bureau, Industry Analysis Division. Long Distance Market Shares, 4th Quarter 1991, Released 3/24/92.

*Data for 1984 is based on the second half of the year. Data for first half 1984 was not available.

Chart 8

AT&T's Toll Revenues * Compared with Other Long Distance Carriers

(1984–1990)



Source: FCC, Common Carrier Bureau, Industry Analysis Division.
* Includes intrastate and interstate revenues.

Chart 9

Number of Long Distance Telephone Carriers

Year	End of Quarter	Using Equal Access		Total All Carriers	
		Common Carriers *	Total **	Common Carriers *	Total **
1986	1	--	169	--	--
	2	--	183	--	--
	3	--	190	--	506
	4	--	210	--	533
1987	1	--	211	--	561
	2	--	213	--	n/a
	3	--	224	--	n/a
	4	--	239	--	540
1988	1	--	238	--	511
	2	--	248	--	519
	3	--	256	--	506
	4	--	266	--	510
1989	1	--	274	--	519
	2	--	287	--	n/a
	3	--	304	--	n/a
	4	--	318	--	519
1990	1	289	295	466	512
	2	288	294	460	506
	3	304	311	462	511
	4	304	311	448	499
1991	1	306	314	446	505
	2	327	342	441	542
	3	337	352	455	528
	4	351	366	472	576

Source: FCC, Common Carrier Bureau, Industry Analysis Division. Summary of Long Distance Carriers, released March 17, 1992.

n/a: Data is not available.

* Separate data for common carriers was not available until 1990.

** Data includes firms not involved in common carriage.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Standards for Assessing
Forfeitures

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1992; Released: June 4, 1992

By the Commission: Commissioner Quello dissenting and issuing a statement; Commissioner Duggan concurring and issuing a statement.

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny several petitions for reconsideration of our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*).[1]

II. BACKGROUND

2. In 1989, Congress amended the Communications Act of 1934 to increase substantially the maximum dollar amounts of forfeitures the Commission could impose under Section 503(b) and under other sections of the Act.[2] Previously, Section 503(b) limited the Commission's forfeiture authority to $20,000 for broadcasters and common carriers and to $5,000 for all other services. The amended Section 503(b) now provides the Commission with authority to assess forfeitures of up to $25,000 against broadcasters, cable operators or applicants for such facilities, $100,000 against common carriers or applicants for such facilities, and $10,000 against others. In addition, there is a limit on forfeitures for continuing violations involving a single act or failure to act of $250,000 for broadcasters, cable operators or applicants for such facilities and $1,000,000 for common carriers or applicants for such facilities. A limit of $75,000 applies to continuing violations involving a single act or failure to act by others. The Commission's forfeiture rule has been amended to reflect the higher forfeiture amounts. 47 C.F.R. § 1.80(b)(1)-(3).

3. On August 1, 1991, the Commission released the *Policy Statement* to assist both the Commission and licensees in adjusting to the statutory increases. The *Policy Statement* provides base forfeiture amounts for a wide range of generic violations, *e.g.*, "[f]ailure to file required forms or information." The base forfeiture amount for each type of violation is a percentage of the statutory maximum for the service involved for each violation or each day of a continuing violation as set forth in Section 503(b). The base forfeiture amount may be increased or decreased by applying adjustment criteria as relevant to the facts in any particular case.

4. In adopting the *Policy Statement*, the Commission expressly retained "discretion in situations that arise" in individual cases and did not consider the *Policy Statement* to be a binding rule. *Policy Statement*, 6 FCC Rcd at 4695 (para. 1), *quoting Guardian Federal Savings & Loan Ass'n v. Federal Savings and Loan Insurance Co.*, 589 F.2d 658, 666 (D.C. Cir. 1978). Accordingly, the Commission issued the *Policy Statement* without conducting a Rule Making proceeding pursuant to section 553 of the Administative Procedure Act (APA). The *Policy Statement* explicitly stated that the notice and comment provisions of the APA do not apply and cited the exception to general Rule Making requirements reserved for general statements of policy. *Policy Statement*, 6 FCC Rcd at 4696 (para. 10), *citing* 5 U.S.C. § 553(b)(A).

III. DISCUSSION

5. The primary argument of most of the petitioners and commenters is that the *Policy Statement* is in reality a substantive rule, not a general statement of policy, and therefore was improperly adopted without notice and comment.[3] For the reasons set forth below, we disagree.

6. As noted above, at the beginning of the *Policy Statement* the Commission expressly indicated its intent to retain discretion in specific cases. 6 FCC Rcd at 4695. As we elaborated in denying a request for stay:

> [T]he *Policy Statement* simply describes the general approach the Commission may take in forfeiture cases and is not binding on any licensees or the Commission. The *Policy Statement* does not impose any obligations on [licensees] or require the Commission to issue a forfeiture of any particular magnitude -- or any forfeiture at all. . . . Most importantly, proposed forfeiture amounts may be challenged in any proceeding in which they are applied and the Commission has broad discretion to take any equitable factors into account, as relevant, to ensure that [licensees] are not assessed substantial forfeitures unless warranted.

Order, 6 FCC Rcd 7016 (1991) (footnote omitted).[4] To the extent any confusion remains, we reiterate that while the *Policy Statement* may guide us and the staff in particular cases, we do not intend for the Commission or the staff to be bound by it. In addition, both the Commission and the staff intend to apply these guidelines flexibly.[5] In particular, we and the staff remain committed to deciding every forfeiture case on the basis of the specific facts and equities presented in the record of that case.[6] *See* 47 U.S.C. § 503(b)(2)(D) (in addition to enumerated factors for setting forfeiture amounts, Commission is required to take into account "such other matters as justice may require").

7. We believe viewing the forfeiture standards as a policy statement rather than a rule fits comfortably within judicial precedent. As the D.C. Circuit recently stated, in determining whether action constitutes a substantive rule or a policy statement, "the ultimate issue is 'the agency's intent to be bound.'" *Public Citizen, Inc. v. NRC*, 940 F.2d 679, 682 (D.C. Cir. 1991), *quoting Vietnam Veterans v. Secretary of the Navy*, 843 F.2d 528, 538 (D.C. Cir. 1988). As noted above, we explicitly do not intend to be bound by the *Policy Statement*. The *Policy Statement* "does not establish a 'binding norm,'" is "not finally determinative of the issues or rights to which it is addressed," and does not "impose any rights and obligations"; moreover, it "genuinely leaves the agency and its decisionmakers free to

exercise discretion." *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (internal citations omitted).[7] Thus, the *Policy Statement* is not a rule.

8. Some petitioners also argue that the *Policy Statement* constitutes a substantive rule because it allegedly changes section 1.80(b)(4) of the Commission's Rules.[8] That section lists the statutory factors that the agency is required to consider in establishing a forfeiture level -- "the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree or culpability, any history or prior offenses, ability to pay, and such other matters as justice may require." *See also* 47 U.S.C. § 503(b)(2)(D). As is apparent from even a cursory review of the adjustment factors in the *Policy Statement*, they closely track the statutory factors repeated in section 1.80(b)(4) of the Rules.[9] In any event, the Commission and the staff will continue to evaluate all evidence in the record of a particular case regarding the factors set forth in the Act and the rules, including any equitable arguments made by a licensee. Thus, the *Policy Statement* is consistent with section 1.80(b)(4).

9. Our treatment of the *Policy Statement* since its adoption is consistent with our intent that it not limit our discretion under the Communications Act.[10] For example, in several Notices of Apparent Liability involving violations of the tariff-filing requirements of the Telephone Operator Services Improvement Act of 1990, 47 U.S.C. § 226, the Commission took into account the fact that a new statute was at issue, even though this did not fit within any of the adjustment factors in the *Policy Statement*.[11] Conversely, the Commission has chosen not to take into account the fact that a violation was repeated even though this is an adjustment factor in the *Policy Statement*.[12]

10. Finally, we note that petitioners raise a wide variety of concerns regarding how the *Policy Statement* will be implemented.[13] In light of the fact that the *Policy Statement* simply provides some general guidance that may be used in particular cases, we believe such concerns are more appropriately addressed in the context of specific cases. Accordingly, we will not address such implementation matters here.

11. We will, however, on our own motion, make one adjustment to the *Policy Statement*. Because licensees in various services share towers, we believe it is appropriate that the base amount for failure to comply with prescribed lighting and marking requirements should be the same for all services. Accordingly, we are changing the base amount in the *Policy Statement* for such violations to $8,000 for all services. In addition, we previously neglected to include violations of 18 U.S.C. § 1343 (fraud by wire, radio or television), and are now adding this violation to the *Policy Statement* on our own motion. A copy of the amended Appendix to the *Policy Statement* is attached as an Appendix hereto.[14]

12. Accordingly, IT IS ORDERED that the petitions for reconsideration of the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), ARE DENIED. IT IS FURTHER ORDERED that Licensees' Petition for Reconsideration of Stay Denial filed December 30, 1991 IS DISMISSED as moot. IT IS FURTHER ORDERED that the Appendix to the *Policy Statement* is revised to read as set forth in the Appendix hereto, effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Petitions for Reconsideration were filed by the following: Alliance of Small Common Carriers (Alliance); the Illinois Telephone Association (Illinois); Blooston, Mordkofsky, Jackson & Dickens on behalf of 24 common carrier radio licensees (Licensees); the National Telephone Cooperative Association (NTCA); the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO); Telocator; Telephone and Data Systems, Inc. (TDS); the United States Telephone Association (USTA); and the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Black Media Coalition, and the Office of Communication of the United Church of Christ (Civil Rights Organizations). Comments were filed by: Civil Rights Organizations; the Land Mobile Communications Council (LMCC); Metropolitan Houston Paging Services, Inc. (MHP); Midwestern Relay Company (Midwestern); Mobile Marine Radio (MMR); the National Association of Broadcasters (NAB); Pacific Bell; Seattle Marine Radio, Inc. (SMR); and Waterway Communications System Inc. (WATERCOM). Reply Comments were filed by: NTCA; Telocator; and USTA. We also received informal comments from KFS World Communications and the Puerto Rico Radio Broadcasters Association. In addition, we received a Motion to Supplement the Record from Victoria Cellular Corporation, which we will treat as an informal comment.

[2] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989) (amending 47 U.S.C. §§ 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 362, 386, 503(b)).

[3] *See* Petitions from Alliance, Licensees, NTCA, OPATSCO, TDS, Telocator, USTA; Comments from MHP, NAB, Pacific Bell; and Reply Comments from NTCA, Telocator, USTA.

[4] Licensees filed a Petition for Reconsideration of Stay Denial on December 30, 1991. Because we are denying the petitions for reconsideration of the *Policy Statement*, we dismiss Licensees' petition as moot.

[5] We continue to believe that it would be inappropriate to proceed by notice and comment Rule Making to adopt binding rules rather than a general statement of policy. Such an approach would unduly limit our discretion in particular cases, which we do not want to do. We note that in urging agencies to adopt forfeiture standards, the Administrative Conference of the United States specifically sanctioned the use of Rule Making *or* policy statements. *Agency Assessment and Mitigation of Civil Monetary Penalties (Recommendation No. 79-3)*, 1 C.F.R. § 305.79-3 (A)(3).

[6] We recognize that, taken out of context, certain language in the *Policy Statement* could be read as indicating an intent by the Commission to be bound by its terms. *See, e.g.*, Licensees Petition at 19-20. We clarify here that that was not our intent.

[7] The standards set forth in the *Policy Statement* appear to be much less specific than the parole eligibility guidelines that the court determined to be substantive rules rather than a statement of policy. *See Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974). One set of "guidelines" in that case consisted of "nine general categories or factors, broken down into a total of 32 sub-categories, often fairly specific," and another set

was even "more formula like." *Id.*, 507 F.2d at 1113. Nor is there any suggestion in that decision that the agency intended to retain broad discretion to act in particular cases. In contrast, here the Commission has stated from the outset that it intends to retain discretion to act as appropriate in particular cases.

[8] *See* NTCA Petition at 4-5, TDS Petition at 7, Telocator Petition at 4, USTA Petition at 15-16; NAB Comments at 2; USTA Reply at 3.

[9] The nature, circumstances, extent and gravity of the violation are reflected in the following adjustment factors: egregious misconduct; substantial harm; substantial economic gain; and minor violation. The degree of culpability and history of prior offenses are reflected in the following adjustment factors: intentional violation; prior violations of same or other requirements; repeated or continuous violation; good faith or voluntary disclosure; and history of overall compliance. Ability to pay is reflected in the ability to pay and inability to pay adjustment factors. Finally, such other matters as justice may require will be taken into account in particular cases as they arise.

[10] The D.C. Circuit has recognized that application of agency action can provide evidence of whether it is properly categorized as a policy statement. *Public Citzen*, 940 F.2d at 689.

[11] *See, e.g., National Tele-Sav., Inc.*, 6 FCC Rcd 6947 (1991); *Call West*, 6 FCC Rcd 6941 (1991).

[12] *See, e.g., TVX Broadcast Group*, 6 FCC Rcd 7494 (1991).

[13] *See, e.g.*, Illinois Petition at 1-5 (base forfeiture amounts for common carriers are too high), Alliance Petition at 7-13 (application of base forfeiture amounts to all common carriers in uniform manner is discriminatory and should instead be applied on a tiered basis); Civil Rights Organizations Petition at 3-7 (broadcast Equal Employment Opportunity violations should be assigned higher priority within the spectrum of rule violations); Licensees Petition at 6-9 (the *Policy Statement contravenes policies protecting small businesses).*

[14] We are also clarifying in the Appendix that certain non-section 503 forfeitures are evaluated on a per day basis under the relevant statutory provisions. *See, e.g., The Cargo Vessel Kodiak Enterprise*, 7 FCC Rcd 1847 (1992).

APPENDIX

STANDARDS FOR ASSESSING FCC FORFEITURES

I. BASE AMOUNTS FOR SECTION 503 FORFEITURES

Violation	% of Stat. Max.[1]	BC/CABLE ($25,000)	CC ($100,000)	Other ($10,000)
Misrepresentation/lack of candor	80%	20,000	80,000	8,000
Construction and/or operation without an instrument of authorization for the service	80%	20,000	80,000	8,000
Unauthorized substantial transfer of control	80%	20,000	80,000	8,000
Violations of rules relating to distress and safety frequencies	80%	20,000	80,000	8,000
False distress communications	80%	20,000	80,000	8,000
Failure to permit inspection	75%	18,750	75,000	7,500
Violations of operator services requirements	75%	n.a.	75,000	7,500
Malicious interference	70%	17,500	70,000	7,000
Failure to respond to Commission communications	70%	17,500	70,000	7,000

[1] The forfeiture ceilings per violation or per day of a continuing violation contained in section 503 of the Communications Act and the Commission's Rules are $100,000 for common carriers or applicants, $25,000 for broadcasters and cable operators or applicants, and $10,000 for all others. 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80. In addition, for continuing violations involving a single act or failure to act, there is an overall limit of $1,000,000 for common carriers or applicants, $250,000 for broadcasters and cable operators or applicants, and $75,000 for all others. Id. The base amounts listed are for a single violation or single day of a continuing violation. Unless Commission authorization is required for the behavior involved, a section 503 forfeiture proceeding against a non-licensee or non-applicant who is not a cable operator or is not operating in the radio control or citizens band radio services can only be initiated for a second violation, after issuance of a citation in connection with a first violation. 47 U.S.C. § 503(b)(5). Forfeitures issued under other sections of the Act are dealt with separately in Section III below.

Violation	% of Stat. Max.	BC/CABLE ($25,000)	CC ($100,000)	Other ($10,000)
Importation or marketing of unauthorized equipment	70%	n.a.	70,000	7,000
Exceeding authorized antenna height	60%	15,000	60,000	6,000
Exceeding power limits	50%	12,500	50,000	5,000
Unauthorized emissions	50%	12,500	50,000	5,000
Using unauthorized frequency	50%	12,500	50,000	5,000
EBS equipment not installed or operational	50%	12,500	n.a.	n.a.
Transmission of indecent/obscene material	50%	12,500	n.a.	5,000
Violation of broadcast EEO rules	50%	12,500	n.a.	n.a.
Violation of political rules: reasonable access, lowest unit charge, equal opportunities and discrimination	50%	12,500	n.a.	n.a.
Fraud by wire, radio or television	50%	12,500	50,000	5,000
Unauthorized discontinuance of service	40%	10,000	40,000	4,000
Use of unauthorized equipment	40%	10,000	40,000	4,000
Violation of children's television commercialization or programming requirements	40%	10,000	n.a.	n.a.
Violation of main studio rule	40%	10,000	n.a.	n.a.
Construction or operation at unauthorized location	40%	10,000	40,000	4,000
Failure to engage in required frequency coordination	40%	10,000	40,000	4,000
Failure to comply with prescribed lighting and marking	varies	8,000	8,000	8,000
Failure to file required forms or information	30%	7,500	30,000	3,000

Violation	% of Stat. Max.	BC/CABLE ($25,000)	CC ($100,000)	Other ($10,000)
Violation of public file rules	30%	7,500	n.a.	n.a.
Violation of sponsorship ID requirements	25%	6,250	n.a.	n.a.
Violation of requirements pertaining to broadcasting of lotteries or contests	25%	6,250	n.a.	n.a.
Violation of technical logs/time brokerage agreements file requirements	20%	5,000	n.a.	n.a.
Broadcasting telephone conversations without authorization	20%	5,000	n.a.	n.a.
Failure to make required measurements or conduct required monitoring	10%	2,500	10,000	1,000
Violation of enhanced underwriting requirements	10%	2,500	n.a.	n.a.
Failure to provide station ID	10%	2,500	10,000	1,000
Unauthorized pro forma transfer of control	10%	2,500	10,000	1,000
Failure to maintain required records	10%	2,500	10,000	1,000
Miscellaneous violations	5%	1,250	5,000	500

II. ADJUSTMENT CRITERIA FOR SECTION 503 FORFEITURES

Upward Adjustment Criteria [2]

(1) Egregious misconduct	50-90%
(2) Ability to pay/relative disincentive [3]	50-90%
(3) Intentional violation	50-90%
(4) Substantial harm	40-70%
(5) Prior violations of same or other requirements	40-70%
(6) Substantial economic gain	20-50%
(7) Repeated or continuous violation	varies [4]

Downward Adjustment Criteria

(1) Minor violation [5]	50-90%
(2) Good faith or voluntary disclosure	30-60%
(3) History of overall compliance	20-50%
(4) Inability to pay	varies [6]

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[2] Both upward and downward adjustments are applied to the base forfeiture amount. More than one factor may apply in a given case.

[3] The Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. § 503(b)(2)(D).

[4] The percentage adjustment for this criterion could vary up to the statutory maximum per violation or per day of a continuing violation.

[5] A "minor" violation is misconduct which is at a low level of seriousness within the violation category. A minor violation is the opposite of "egregious misconduct."

[6] As noted above, the Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. § 503(b)(2)(D). The application of a downward adjustment for inability to pay is based upon a showing of substantial financial hardship. Inability to pay would generally be considered as a downward adjustment factor only upon a specific showing by the entity against whom forfeiture action is taken.

III. NON-SECTION 503 FORFEITURES

Violation		Statutory Amount [7]
Sec. 202(c)	Common carrier discrimination	$6,000 + $300/day
Sec. 203(e)	Common carrier tariffs	$6,000 + $300/day
Sec. 205(b)	Common carrier prescriptions	$12,000
Sec. 214(d)	Common carrier line extensions	$1,200/day
Sec. 219(b)	Common carrier reports	$1,200
Sec. 220(d)	Common carrier records & accounts	$6,000/day
Sec. 223	Dial-a-Porn	$50,000 maximum/day
Sec. 364/386	Ship radio	$5,000/day (owner) $1,000 (master)
Sec. 506	Great Lakes Agreement	$500/day (owner) $100 (master)
Sec. 634	Cable EEO	$200/day

Note: Non-section 503 forfeitures may be adjusted downward using the "Downward Adjustment Criteria" shown for section 503 forfeitures in Section II above.

[7] Unlike section 503, which establishes maximum forfeiture amounts, other sections of the Act, with one exception, state prescribed amounts of forfeitures for violations of the relevant section. These amounts are then subject to mitigation or remission under section 504 of the Act. The one exception is section 223 of the Act, which provides a maximum of $50,000 per day. For convenience, the Commission will treat the $50,000 per day set forth in section 223 as if it were a prescribed base amount, subject to downward adjustments.

Dissenting Statement of Commissioner James H. Quello

In the Matter of Standards for Assessing Forfeitures

In the past year, the Commission has engaged in an "attic to basement review" of our radio ownership policies, initiated a similar inquiry with respect to television, reformed the comparative hearing process, and adopted broadly gauged deregulatory initiatives applicable to common carrier and private radio services. The common theme of these various actions is to "provide a minimally intrusive regulatory framework to expedite and foster service to the American public."[1]

Yet at the same time, the *Memorandum Opinion and Order* approved here increases the base fine for most rule violations by more than six times. What is wrong with this picture?

The apparent contradiction between the Commission's new enforcement policies and the deregulatory initiatives is particularly striking in the case of broadcasting. Our current review of the television rules, for example, is based on findings that "[t]elevision will be a smaller and far less profitable business" and that "small market stations, weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some are likely to go dark."[2] In March, we relaxed radio ownership rules, in part, because the financial "outlook for small radio stations, which comprise the bulk of the radio industry, is particularly bleak."[3] Before the Commission adopted the new radio rules, the Mass Media Bureau prepared an Overview of the Radio Industry which found that small radio stations — the bulk of the industry — are in "profound financial distress."[4]

It is noteworthy that, at least in the context of ownership rules, the Commission concluded that the public interest demands easing the economic pressures facing the broadcasting industry. We found, for example, that "[t]he industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability" and that this ability is "substantially threatened."[5] Accordingly, the Commission adopted ownership changes in order to promote efficiency and reduce administrative costs. Our hope is that consolidation may save about 10 percent of stations' general and administrative expenses.[6]

It is acutely ironic that the Commission would impose harsher penalties across the board while simultaneously launching various crusades to save the broadcasting medium. In doing so, the Commission is sending the strange message that "we love broadcasting — it's just broadcasters we can't stand."

Of course, the irony extends not just to broadcasting, but to virtually all the services we regulate. The Chairman's recent report to the President listed deregulatory initiatives for wireless cable, satellite services, specialized mobile radio services, cellular telephone services, private land mobile radio services, equipment authorization rules, experimental authorization processing, common carrier complaints, and amateur operator requirements, among other areas. The report suggests that "streamlining rules and removing unnecessary regulatory barriers will . . . create major savings to industry" and estimates that reducing paperwork burdens will save $4 million per year.[7]

But the Commission is prepared to take away, as well as to give. In 1991, for example, the Commission collected approximately $1.35 million in forfeitures.[8] If, under the new forfeiture guidelines, our collections are tripled, we will take in over $4 million in fines. This probably is a conservative estimate.

In essense then, the Commission's actions, taken as a whole, are not so much deregulation as a shift of regulatory burdens from certain licensees to others. Some may argue — with some force — that the burdens are justified, since they fall only on those who violate our rules. But this assumes that the burdens are proportional to both the magnitude of the "crimes" and the economic strength of the malefactors. Such an assumption is unwarranted, and I am concerned that we are engaging in regulatory overkill.

The forfeiture levels under the new guidelines have been multiplied for all licensees, regardless of the size of the station or the market involved. But as the Mass Media Bureau pointed out last January, "[r]adio today is a world of large haves and little have nots." It noted that "at least half of the 10,000 stations lost money — primarily stations doing less than $1 million in revenue. These small stations have operated at the margin for years."[9] Moreover, conditions are worsening. Since 1988, according to the Bureau, average AM profits have dropped by half and average FM profits have fallen by one-third. For a station in financial trouble, adding several

thousand dollars to a fine may make the difference between a profitable and an unprofitable year. And as we recognized in *Revision of Radio Rules and Policies*, "many stations have had to cut back significantly on staff and programming as they struggle to conserve resources."

Most recently, the Commission adopted a *Notice of Proposed Rulemaking* proposing to relax our television ownership rules. The *Notice* was based on the recognition that "[p]rofits of broadcast television stations . . . have declined steadily in recent years" and that outside the major markets, "losses apparently have become the norm."[10] The Commission should not add unnecessarily to these problems.

The majority suggests that the forfeiture guidelines are not a firm policy, and that the Commission has the discretion to modify fines that are excessive under the circumstances of a specific case. But our experience with the guidelines suggests that this solution is more theoretical than real. The Commission has declined to reduce forfeitures for stations even where they demonstrated financial hardship, including significant net losses. *E.g., Springtown Educational Broadcasting Foundation*, DA 92-496 (released April 24, 1992); *Southern California Broadcasting Co.*, FCC 92-221 (adopted May 15, 1992).

Finally, I want to emphasize that I fully support the decision of Congress to increase the Commission's forfeiture authority. In fact, I have advocated such an increase for years. Congress recognized that the existing fines and penalties had not been increased since 1934, when the Communications Act was adopted.[11] Given the huge size of some communications industries, the Commission clearly must have the ability to make its orders and penalties meaningful.

Nevertheless, we should consider whether it is necessary to increase the amount of our fines in every case or in routine cases, given the current economic climate and state of marketplace change. Ultimately, the purpose of issuing a forfeiture is to obtain compliance with the Communications Act. I question whether it is necessary to multiply the Commission's "base forfeiture amount" by six times or more to secure compliance from a licensee who may be in a precarious financial situation.

Accordingly, I would have voted to reconsider the *Standards for Assessing Forfeitures*.

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[1] *Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program* (April 28, 1992). The Report responded to the President's January 28, 1992 request to federal agencies to "evaluate existing regulations and programs and to accelerate action on initiatives that will eliminate any unnecessary regulatory burden or otherwise promote economic growth." Chairman Sikes stated on March 12 that the Commission would review all regulations that "impose needless costs on consumers and substantially impede economic growth." *Statement of FCC Chairman Alfred C. Sikes* (March 12, 1992).

[2] Office of Plans and Policies Working Paper #26, *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd. 3996, 3999 (1991); *Review of the Policy Implications of the Changing Video Marketplace*, 6 FCC Rcd. 4961 (1991).

[3] *Revision of Radio Rules and Policies*, MM Docket 91-140 at ¶ 9 (1992).

[4] Memorandum from Roy Stewart to Commissioners, *Overview of the Radio Industry* (January 29, 1992). Among other findings, the *Overview* revealed that at least half of all radio stations are losing money and that 0.5% of all stations account for 50% of industry profits.

[5] *Revision of Radio Rules and Policies*, MM Docket 91-140 at ¶ 10.

[6] *Id.* at ¶ 11.

[7] *Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program* (April 28, 1992).

[8] The forfeiture amounts were supplied by the Office of the Managing Director.

[9] *Overview of the Radio Industry* at 1.

[10] *Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221 (adopted May 14, 1992) ("In 1989, at least 25 percent of stations in the top ten markets experienced losses; aggregate losses occurred in most markets below the top 100; and at least 50 percent of independents in all market classes below the top ten experienced losses.").

[11] Budget Reconciliation Act, HOUSE CONF. REP. No. 101-386 at 435.

Separate Statement
of
Commissioner Ervin S. Duggan

>In the Matter of Standards for Assessing Forfeitures

As the Commission moves to reaffirm its new forfeiture standards, I have some misgivings about the possible mechanistic use of these guidelines: about whether they will be applied in the future with sufficient fairness and flexibility. To underscore my concerns, I shall concur in the Commission's action.

Assessing forfeitures has traditionally been troublesome for the Commission, requiring us to balance our goal of consistent, certain enforcement with flexibility, and the need to take individual circumstances into account. I therefore support the Commission's decision to move away from its former case-bycase approach toward a more uniform and understandable system of levying fines.

I believe strongly, on the other hand, that we need to retain some flexibility in issuing forfeitures. In some cases, for example, extenuating circumstances may necessitate lowering a fine rather than robotically applying the written guidelines. One longstanding principle of jurisprudence is that the punishment should fit the crime; this often requires a full and fair examination of the particular facts at hand, and some flexibility in response to those facts.

I also share Commissioner Quello's concerns about the unfairness of requiring small businesses to pay fines that may be beyond their ability to pay. Indeed, I find it ironic that we are adopting these guidelines, so reminiscent of the federal government's mandatory sentencing guidelines, just as those guidelines are coming under increasing criticism for the straitjacket they put upon judges.

Despite my misgivings, I support the Commission's decision because we expressly state that the standards will serve as guideposts rather than rigid, mandatory rules. In particular, our decision lists a number of mitigating factors that will be taken into account on a case-by-case basis. I am also pleased that the Field Operations Bureau has adopted my suggestion for a new "first offender" policy, which will show some leniency toward persons who have unintentionally committed minor infractions of our rules.[1] Finally, I believe that the ongoing and regular meetings of enforcement officials from the FCC's different bureaus can help ensure that our forfeiture guidelines will be interpreted fairly and equitably.

[1] *See* "Application of Monetary Forfeiture Delegated Authority Standards for Nonintentional Nonsafety Violations in 'Other' Category" FOB Enforcement Manual.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 11, 1992

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Adams, C.K. d/b/a Abilene Community Radio - Request for refund of a hearing fee for a FM station at Amarillo, Texas - **Granted** (July 29, 1992).

Adams, C.K. d/b/a Westwind Two - Request for refund of a hearing fee for a FM station at Amarillo, Texas - **Granted** (July 29, 1992).

Alexsii Corporation - Petition for Reconsideration for a new FM station at Temecula, California - **Denied** (July 27, 1992).

Boyle, Donna Haseloff - Request for refund of a hearing fee for a new FM broadcast station at Telluride, Colorado - **Granted** (July 13, 1992).

Broadcasting Systems, Inc. - Request for refund of a filing fee for a LPTV station in Phoenix, Arizona - **Denied** (July 20, 1992).

Button, David T. and Ann D.G. - Request for refund of a hearing fee for a new FM broadcast station in Canton, New York - **Granted** (July 27, 1992).

Cincinnati Bell Telephone - Request for refund of a filing fee for waiver of Part 69 - **Denied** (July 07, 1992).

Cornick, James Killinger - Request for refund of a hearing fee for a new FM station at Marion, Virginia - **Granted** (July 29, 1992).

DMR Media, Inc. - Request for refund of a hearing fee for a new FM broadcast station at Morris, Illinios - **Granted** (July 07, 1992).

Delmarva Broadcast Service General Partnership - Request for refund of a fee - **Granted** (July 20, 1992).

Desert Rock Limited Partnership - Request for refund of a hearing fee for a new FM station at Healdsburg, California - **Granted** (July 13, 1992).

EH Communications, Inc. - Request for reinstatement - **Denied** (July 20, 1992).

Great American Communications, Inc. - Request for refund of a hearing for a new FM station at Manahawkin, New Jersey - **Granted** (July 27, 1992).

Imbragulio, Bobbye - Request for refund of a hearing for a new FM station at Pearl, Mississippi - **Granted** (July 07, 1992).

Jersey Devil Broadcasting Company - Request for refund of a hearing for a new FM station at Manahawkin, New Jersey - **Granted** (July 28, 1992).

Koor Communications, Inc. - Request for refund of a hearing fee for a radio station at New London, New Hampshire - **Denied** (July 29, 1992).

Macon County Broadcasting, Inc. - Petition for Reconsideration for a new FM station in Lafayette, Tennessee - **Denied** (June 30, 1992).

Mardirossian, Aris - Request for refund of a hearing fee for a new FM station at Ocean City, Maryland - **Granted** (July 27, 1992).

Platte Broadcasting Co., Inc. - Petition for reconsideration for a new FM station at Plattsmouth, Nebraska - **Denied** (July 21, 1992).

Rocky Mount Broadcasting - Request for refund of a hearing fee for a new FM station at Greenville, Georgia - **Granted** (July 29, 1992).

Scott County Communications, Inc. - Request for refund of a hearing fee for a new FM station at Stamping Ground, Kentucky - **Granted** (July 20, 1992).

Sorenson Broadcasting Corporation - Request for refund of a filing fee for a AM station at Red Wing, Minnesota - **Granted** (July 20, 1992).

Tri-State Broadcasting - Request for refund of a hearing fee for a new FM station at Asbury, Iowa - **Granted** (July 27, 1992).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 29 1992

James L. Oyster, Esquire
Rt. 1, Box 203A
Castleton, Virginia 22716

Dear Mr. Oyster:

This is in response to your requests for refunds of the hearing fee payments made by C.K. Adams, d/b/a Abilene Community Radio (Abilene), and C.K. Adams d/b/a Westwind Two (Westwind), that Mr. Adams submitted in connection with his two applications for an FM station. Mr. Adams' Abilene application requests authority to operate on Channel 264C at Abilene and his Westwind application seeks authority to operate on Channel 265C1 at Amarillo.

Following the timely submission of his hearing fees, Mr. Adams and the remaining applicants for the station at Abilene filed a settlement agreement with the Mass Media Bureau prior to the designation of the competing applications for hearing. The Bureau granted Mr. Adams' Westwind application and dismissed his Abilene application, as contemplated in the agreement.

Section 1.1111(c)(4) provides for a refund of hearing fees whenever applications, not yet designated for hearing, are granted or dismissed pursuant to the terms of a settlement agreement. 47 C.F.R. § 1.1111(c)(4).

Accordingly, your request is granted. Separate checks, each drawn in the amount of $6,760.00 and made payable to C.K. Adams, d/b/a Westwind Two and C.K. Adams, d/b/a Abilene Community Radio, respectively, will be forwarded to you at the earliest practicable time. If you have any questions concerning these refunds, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 27 1992

James L. Winston, Esquire
Rubin, Winston, Diercks,
Harris & Cook
1730 M Street, N.W.
Room 412
Washington, D.C. 20036

Dear Mr. Winston:

This is in response to Alexsii Corporation's Petition for Reconsideration of the determination that its hearing fee was late filed. The fee was filed in conjunction with Alexsii's application for a new FM station in Temecula, California. That application was subsequently dismissed due to the late filing of the fee.

You state that Alexsii used the Commission's "back-up" filing procedure in filing the hearing fee on July 15, 1991. You contend that Alexsii complied with all of the procedural requirements for utilizing the "back-up" filing procedure, and you further assert that there was no indication from the Commission that this filing procedure could not be used for the July 15, 1991 fee filing. You state that a determination that Alexsii did not timely file its hearing fee "deprive[s] Alexsii of its due process right to prior notice of changes in Commission policy."

On May 15, 1991, the Commission released a document that included specific filing instructions for the July 15th filing deadline. That document was entitled "Procedures for the Payment of Hearing Fees By Applicants for Broadcast Facilities," and was appended to a Commission Order regarding reform of the comparative hearing process. Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 3403, 3408 (1991). There, the Commission explained that it was adopting a new procedure for the payment of hearing fees. And, in a separate paragraph in bold type and capitol letters, the Commission stated that applicants who had been accepted for filing in a public notice released prior to July 1, 1991, must pay the hearing fee on July 15, 1991. The Commission further stated in bold type that there were specific "Filing Procedures for July 15, 1991 Submissions." It explicitly stated that the fee must be transmitted "to the Commission's lockbox bank in Pittsburgh, Pennsylvania so that it is received by the bank before midnight July 15, 1991." Id. (emphasis added). It further stated that "[f]ailure to make the hearing fee payment in a timely manner will result in the dismissal of the underlying pending application." Id. (emphasis in the original).

Neither the "back-up" filing procedure nor the extra day policy, which permits an extra day for the filing of time critical broadcast and common carrier applications, applies to your fee filing. These policies did not apply to the July 15, 1991 fee submissions, but applied only to filing fees that accompanied applications or notices of appearance that were required to be filed by a particular time. The July 15 filing date, in contrast, was not established to coincide with either an official "cut off" date for the filing of an application or the date for filing a notice of appearance; it was a one-time deadline established exclusively for the filing of fees at the Mellon Bank. The May 15 Public Notice left no doubt that these fees had to be received at the bank by midnight July 15. The Commission, moreover, has never stated or suggested that the extra day policy applied to the July 15 deadline set for fees.

In view of the Commission's emphatic instructions pertaining to the July 15th deadline, we conclude that Alexsii had ample notice of the relevant filing procedures for the July 15, 1991 time frame and that its fee was late filed.

Accordingly, your Petition for Reconsideration is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 13 1992

Ms. Catherine M. Withers, Esquire
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Dear Ms. Withers:

This is in response to your request for a refund of the hearing fee submitted by Donna Haseloff Boyle in connection with her application for a new FM broadcast station at Telluride, Colorado.

Ms. Boyle and the sole competing applicant filed a settlement agreement pursuant to which Ms. Boyle would become the licensee of the new station at Telluride. The Mass Media Bureau, without designation of the applications for hearing, approved the settlement agreement, dismissed the competing applicant, and awarded the license to Ms. Boyle. See letter to Judith Press Brenner and Donna Haseloff Boyle, dated May 15, 1992 from Dennis Williams, Chief, FM Branch.

Section 1.1111(c)(1) states that a broadcast applicant is entitled to a refund of its hearing fee whenever its application is granted without designation for hearing. 47 C.F.R. § 1.1111(c)(1).

Accordingly, your request for refund is granted. A check, drawn in the amount of $6,760.00 and payable to Donna Haseloff Boyle, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 20 1992

Mr. Kenneth Casey
President
Broadcasting Systems, Inc.
One West Lone Cactus Drive
Phoenix, Arizona 85027

Dear Mr. Casey:

This is in response to your request for a refund of the fee filed by Broadcasting Systems, Inc. (Broadcasting) with its application for Special Temporary Authority (STA) to operate Low Power Television Station K25DM, Phoenix, Arizona.

You request a fee refund because Broadcasting is withdrawing its application for an STA since it has now filed an application for authority to go dark until its pending application for a new transmitter site is granted.

Our review of this matter discloses no basis for grant of the refund. In establishing its fee program, the Commission declared that a refund would be permitted only in the limited circumstances enumerated in section 1.1111 of the rules. 47 C.F.R.. § 1.1111. See Fee Collection Program, 2 FCC Rcd 947, 949 (1987), reconsidered in part, 3 FCC Rcd 5987 (1988). Section 1.1111 contains no authorization for refund of a fee due to the withdrawal of the underlying application. Rather, it is the Commission's policy to retain the application fee submitted once the fee payment is processed. Moreover, the Commission has explicitly rejected the issuance of a refund based upon an application's disposition. Id.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 27 1992

Eugene T. Smith, Esquire
715 G Street, S.E.
Washington, D.C. 20003

Dear Mr. Smith:

This is in response to your request for a hearing fee refund submitted on behalf of David T. and Ann D.G. Button (Button), permittee of a new FM broadcast station at Canton, New York.

You state that the permittee's application was designated for hearing along with three other competitors. Of the four applicants, Button was the only one to pay the hearing fee. Since there was no comparative hearing, you now request that the hearing fee be refunded.

Section 1.1111(b)(3) of the Commission's rules provides for the refund of a hearing fee if the applicant is the only applicant designated in the proceeding that files a Notice of Appearance and that single remaining applicant is immediately grantable. Because Button is the only applicant who filed a Notice of Appearance on September 10, 1990 and whose application was granted on February 12, 1991, the hearing fee may be returned.

Accordingly, a check for $6,760, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 7 1992

Mrs. Debbie Davidson
Cincinnati Bell Telephone
201 E. Fourth Street, 102-300
P.O. Box 2301
Cincinnati, Ohio 45201

Dear Mrs. Davidson:

This is in response to your request for refund of the fee paid by Cincinnati Bell Telephone (CBT) for filing a petition for waiver of Part 69 of the Commission's rules.

In support of your request, you state that CBT tendered the $4,660 fee on September 28, 1990, accompanying its petition for waiver. You also state that, on reconsideration of aspects of the Fee Collection Program, the Commission determined that the filing fee did not apply to requests for waiver of the tariff rules and requirements in Part 69. You now request that CBT's fee be returned.

On reconsideration of Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 6 FCC Rcd 5919 (1991), the Commission concluded that "Congress did not intend the waiver fee to apply to requests for waiver of tariff rules and requirements in Part 69, and clarify herein that we will henceforth follow this interpretation." 6 FCC Rcd at 5923, ¶33. Because the Commission expressly limited the change in its interpretation to prospective application, we are unable to refund CBT's fee, which was submitted prior to the effective date of the reconsideration order.

Accordingly, your request for filing fee refund is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 29 1992

William H. Crispin, Esquire
Verner, Liipfert, Bernhard,
McPherson & Hand
901-15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301

Dear Mr. Crispin:

This is in response to your request for a hearing fee refund submitted on behalf of James Killinger Cornick, a former applicant for a new FM station on Channel 278A in Marion, Virginia.

You state that prior to the Notice of Appearance deadline, Mr. Cornick and Cope II Broadcasting Partners, the sole mutually exclusive applicants for the construction permit, filed a Joint Request for Approval of Settlement Agreement, which provides for the dismissal of Cope II's application and the grant of Mr. Cornick's application. You have also submitted a copy of the Memorandum Opinion and Order approving the settlement agreement. You now request that Mr. Cornick's hearing fee be refunded.

The Commission will refund an applicant's hearing fee if a settlement agreement is filed with the presiding Administrative Law Judge by the Notice of Appearance deadline. 47 C.F.R. §1.1111 (b)(4). Our review of the matter discloses that Mr. Cornick timely filed the settlement agreement for purposes of receiving a refund.

Accordingly, a check for $6,760.00, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 7 1992

Michael H. Bader, Esq.
Haley, Bader & Potts
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036-3374

Dear Mr. Bader:

This is in response to your request for refund of hearing fee submitted on behalf of DMR Media, Inc. (DMR), the successful applicant for a new FM radio broadcast station at Morris, Illinois.

You have submitted documents demonstrating that DMR tendered a hearing fee in the amount of $6,760. You additionally have submitted a letter by the Chief, Audio Services Division, granting DMR's application following approval of a settlement agreement. The agreement was filed before the proceeding was designated for hearing. You now request that DMR's hearing fee be refunded.

Section 1.1111(b)(4) of the Commission's rules provides for refund of the hearing fee in cases where a settlement agreement, filed by the Notice of Appearance deadline, provides for the dismissal of all but one of the applicants and the surviving application is immediately grantable or if matters specified in the designation order can be deleted. 47 C.F.R. § 1.1111(b)(4). Because DMR's application has been granted pursuant to a timely filed settlement agreement, the hearing fee may be returned.

Accordingly, a check for $6,760, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 20 1992

Lawrence N. Cohn, Esquire
Cohn and Marks
333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036-1573

Dear Mr. Cohn:

This is in response to your request for a refund of the fee submitted, under protest, by Delmarva Broadcast Service General Partnership in connection with its petition for a declaratory ruling that its television broadcast station WMDT, Salisbury, Maryland was "significantly viewed" in certain counties of Delaware and Maryland.

In its Memorandum Opinion and Order entered on reconsideration of the Fee Collection Program, the Commission determined that fees for "significantly viewed" petitions were not generally contemplated under the fee legislation or the Fee Collection Program. See 47 U.S.C. § 158; see also Fee Collection Program, 2 FCC Rcd 1001 (1987), as modified, 3 FCC Rcd 5987, 5989 (1988).

Accordingly, your request is granted. A check, drawn in the amount of $700.00 and made payable to Delmarva Broadcast Service General Partnership, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JUL 13 1992

OFFICE OF
MANAGING DIRECTOR

Arthur V. Belendiuk, Esquire
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

Dear Mr. Belendiuk:

This is in response to your request for a refund of the hearing fee submitted by Desert Rock Limited Partnership (Desert), former applicant for a new FM station at Healdsburg, California.

You request a refund because Desert requested dismissal of its application before the time for filing Notices of Appearance in the comparative proceeding to select the licensee at Healdsburg.

Section 1.1111(b)(2) of the Commission's rules states that a broadcast license applicant is entitled to a refund whenever the applicant is dismissed for failure to file a Notice of Appearance. 47 C.F.R. § 1.1111(c)(2). Therefore, Desert is entitled to a refund because it withdrew from the proceeding rather than file a Notice of Appearance.

Accordingly, your request is granted. A check, drawn in the amount of $6,670.00 and made payable to Desert Rock Limited Partnership, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 20 1992

Ms. Edith Hardesty
President
P.O. Box 1194
St. George, Utah 84771

Dear Ms. Hardesty:

Dennis Williams, the Chief, FM Branch, Mass Media Bureau, has asked that I respond to your request, styled as an Application for Review, for reinstatement of an application filed by EH Communications, Inc., (EH) for a new FM station at St. George, Utah. First, allow me to apologize for the delay in communicating with you.

You state that the Mass Media Bureau dismissed your application because you did not tender the requisite hearing fee payment following the issuance of a Public Notice requiring payment of the fee by a date certain. However, you request reinstatement of EH's application because you were unaware of EH's obligation to pay the fee, and, in your view, the Commission failed to notify you that the fee was due. Your petition is opposed by Mr. Marvin Kent Frandsen, a competing applicant for the station at St. George.

Under the Commission's revised policy concerning the submission of hearing fees, mutually exclusive broadcast applicants are required to file their hearing fees by a date certain prior to the designation of the competing applications for a comparative proceeding. See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 56 Fed. Reg. 787, 787-788 (January 9,1991) reconsidered in part, 56 Fed. Reg. 25636 (June 5, 1991). In its reconsideration, the Commission specifically established July 15, 1991, as the date by which such hearing fees were due from mutually exclusive applicants whose applications had been accepted for filing, but were not yet designated for hearing. See 56 Fed. Reg. at 25638. EH and Mr. Frandsen's application were subject to this requirement because their applications had been accepted for filing, but no Hearing Designation Order had been issued concerning selection of the licensee at St. George when the revised hearing fee policy became effective. See Public Notice, released March 11, 1991. The Public Notice establishing July 15 as the filing dateline explicitly stated that applicants who did not file their hearing fees by that date would have their applications dismissed. See 56 Fed. Reg. 25638.

Moreover, the Commission's rules do not provide for reinstatement of an application if a hearing fee or other fee payment is required by a date certain and the payment is not made or is untimely submitted. Rather, the Commission has explicitly limited the circumstances upon which such applications will be reinstated. See 47 C.F.R. § 1.1114(a)(2). In this instance, we can find no basis for waiver of the requirement.

Accordingly, your request for reinstatement is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 27 1992

Richard M. Riehl, Esquire
Haley, Bader & Potts
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036-3374

Dear Mr. Riehl:

This is in response to your request for a hearing fee refund submitted on behalf of Great American Communications, Inc. (GACI), former applicant for a new FM broadcast station on Channel 289B1 at Manahawkin, New Jersey.

You have submitted documents demonstrating that GACI tendered a hearing fee in the amount of $6,760. You additionally have submitted a copy of the Memorandum Opinion and Order, approving the settlement agreement which GACI entered with Press Broadcasting, Inc. The agreement was filed before the proceeding was designated for hearing. You now request that GACI's hearing fee be refunded.

Section 1.1111(b)(4) of the Commission's rules provides for a hearing fee refund in cases where a settlement agreement, filed by the Notice of Appearance deadline, provides for the dismissal of all but one of the applicants and the surviving application is immediately grantable or if matters specified in the designation order can be deleted. 47 C.F.R. §1.1111(b)(4).

In this case, a settlement agreement was filed prior to the Notice of Appearance deadline, but "outstanding matters" are still pending in that a competing applicant, Seashore Broadcasting, filed an Application for Review of the settlement's approval. Nevertheless, our review of the matter discloses that GACI timely filed its settlement agreement. Accordingly, the refund is granted. In the event, however, that the Commission vacates the settlement agreement and designates the matter for hearing, GACI will be required to resubmit its hearing fee.

Accordingly, a check for $6,760, payable to the maker of the original check, will be forwarded at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 7 1992

David N. Roberts, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036-2679

Dear Mr. Roberts:

This is in response to your request for a refund of the hearing fee submitted by Bobbye Imbragulio, permittee of a new FM station in Pearl, Mississippi.

You state that, after the hearing fee was timely filed, a Settlement Agreement was filed and pursuant to that Agreement the application of Imbragulio was granted and the competing application of Johnston & Johnston Broadcasting was dismissed. No hearing designation order was issued.

Section 1.1111(c)(1) of the Commission's Rules provides for the return of a hearing fee whenever an application is granted without designation for hearing. 47 C.F.R. § 1.1111(c)(1).

Accordingly, your request is granted. A check drawn in the amount of $6,760.00 and made payable to the maker of the original check will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 28 1992

William D. Freedman, Esquire
Gurman, Kurtis, Blask
& Freedman
1400 16th Street, N.W.
Suite 500
Washington, D.C. 20036

Dear Mr. Freedman:

This is in response to your request for a hearing fee refund submitted on behalf of Jersey Devil Broadcasting Company, Inc.("Jersey Devil"), former applicant for a new FM station at Manahawkin, New Jersey.

You state that Jersey Devil tendered its hearing fee on July 9, 1991. You further state that Jersey Devil entered into a Joint Petition for Approval of Settlement Agreement which was granted by Memorandum Opinion and Order, FCC 91M-2893, released September 23, 1991. You now request that Jersey Devil's hearing fee be refunded pursuant to §1.1111(b)(4) of the Commission's rules.

Section 1.1111(b)(4) of the rules allows a hearing fee refund when a settlement agreement filed with the presiding Administrative Law Judge by the Notice of Appearance deadline provides for the dismissal of all but one of the applicants, and the single remaining applicant is immediately grantable. However, if the single remaining applicant is not immediately grantable, it is not entitled to a refund unless all outstanding matters can be deleted.

In this case, a settlement agreement was filed prior to the Notice of Appearance deadline, but "outstanding matters" are still pending in that a competing applicant, Seashore Broadcasting, filed an Application for Review of the settlement's approval. Nevertheless, our review of the matter discloses that Jersey Devil timely filed its settlement agreement. Accordingly, the refund is granted. In the event, however, that the Commission vacates the settlement agreement and designates the matter for hearing, Jersey Devil will be required to resubmit its hearing fee.

Accordingly, a check for $6,760, payable to the maker of the original check, will be forwarded at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 29 1992

Mr. Robert L. Vinikoor
WNTK TALKRADIO
Koor Communications, Inc.
P.O. Box 2259
New London, New Hampshire 03257

Dear Mr. Vinikoor:

This is in response to your request for a refund of the hearing fee submitted for an application to construct a new radio station, Channel 259A, at New London, New Hampshire.

You state that you have submitted a hearing fee in the amount of $6,760. You further state that Sunapee Lake Broadcasting, the only other applicant for this location, has not filed their hearing fee, and therefore, there is no need for a comparative hearing. You now request a refund of the hearing fee.

Section 1.1111(b)(3) of the Commission's rules provides for a hearing fee refund in cases where the applicant is the only party designated in the proceeding that files a Notice of Appearance, and that single remaining applicant is immediately grantable or grantable upon deletion of any matters specified in the designation order. In the instant case, the application is still under engineering review, and is not immediately grantable.

Accordingly, your request for a refund of the hearing fee must be denied because it is premature.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JUN 30 1992

OFFICE OF
MANAGING DIRECTOR

Dennis F. Begley, Esquire
Reddy, Begley & Martin
2033 M Street, N.W.
Suite 500
Washington, D.C. 20036

Dear Mr. Begley:

This is in response to your Petition for Reconsideration of the Managing Director's initial decision to deny the request of Macon County Broadcasting, Inc. (MCBI) for acceptance, nunc pro tunc, of a hearing fee filed in connection with an application for a new FM station in Lafayette, Tennessee.

You indicate that the facts and circumstances concerning this proceeding have changed "substantially" since the filing of the earlier request for acceptance, nunc pro tunc, of MCBI's hearing fee. You state that MCBI and the sole competing applicant, Ivon O. Davis, entered into a settlement agreement on March 17, 1992 under which MCBI agreed to dismiss its application in return for Davis granting MCBI an exclusive option to acquire the construction permit from Davis subject to Commission approval. The parties filed a settlement agreement and a request for its approval shortly before the letter ruling was released denying MCBI's request for acceptance of the hearing fee.

Although the reason advanced now for acceptance of the hearing fee has changed, the reason why the hearing fee was late in the first place has not changed. As stated previously, the burden of compliance with the fee requirements is placed on the applicant, and the rules do not permit acceptance nunc pro tunc of a hearing fee that is late due to reasons within an applicant's control. Moreover, the fact that the parties have entered into a settlement agreement is of no decisional consequence since the application of MCBI will be dismissed in any event.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 27 1992

Nora E. Garrote, Esquire
Piper & Marbury
1200 19th Street, N.W.
Washington, D.C. 20036-2430

Dear Ms. Garrote:

This is in response to your request for a hearing fee refund submitted on behalf of Aris Mardirossian, a former applicant for a new FM broadcast station at Ocean City, Maryland.

You state that Mr. Mardirossian filed a Request for Voluntary Dismissal and does not intend to file a Notice of Appearance, and that, therefore, he is entitled to a refund of his hearing fee.

Section 1.1111(b)(2) of the Commission's rules provides for the refund of a hearing fee for broadcast applicants that pay their hearing fee before the release of an order designating the matter for hearing whenever the application is either dismissed voluntarily or involuntarily, prior to designation for hearing. 47 C.F.R. § 1.1111(b)(2). Our review of this matter discloses that Mr. Mardirossian's application was timely dismissed for purposes of receiving a refund.

Accordingly, your request is granted. A check for $6,760.00, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JUL 21 1992

OFFICE OF
MANAGING DIRECTOR

Richard J. Hayes, Jr., Esquire
13809 Black Meadow Road
Greenwood Plantation
Spotsylvania, Virginia 22553

Dear Mr. Hayes:

This is in response to your petition for reconsideration of the denial of your request for refund of the hearing fee paid by Platte Broadcasting Co., Inc. (Platte), successful applicant for a new FM station at Plattsmouth, Nebraska.

Platte and the sole competing applicant filed a proposed settlement agreement prior to the time for filing Notices of Appearance in the comparative proceeding to select the licensee at Plattsmouth. Subsequently, Platte filed an amendment to its application in order to resolve an air hazard issue designated in the Hearing Designation Order (HDO) which commenced the proceeding. See Communications Ventures, Limited Partnership, MM Docket No. 90-269, released June 5, 1990. The presiding Administrative Law Judge (ALJ) approved the settlement agreement and dismissed the competing applicant, but withheld grant of Platte's application to await comments on its amendment by the Mass Media Bureau. See Communications Ventures, Limited Partnership, MM Docket No. 90-269, released July 13, 1990. Subsequently, the ALJ granted Platte's application after ruling favorably on the amendment.

You state that Platte should receive a refund because it would have been entitled to a refund under the Commission's rules had its amendment been granted prior to approval of its settlement agreement since Platte's application would then have been ready for grant when the ALJ ruled on the settlement agreement. You argue that the Commmission's rule governing refunds was not intended to work in such an inequitable fashion.

Section 1.1111(c)(4) of the Commission's rules provides that a hearing fee will be returned whenever a settlement agreement is filed by the Notice of Appearance deadline and the surviving application is "immediately" ready for grant. 47 C.F.R. § 1.1111(c)(4). In contrast, the fee will be retained if the HDO required the applicant to file a post-designation amendment which must be resolved on its merits by summary decision or otherwise.

47 C.F.R. § 1.1111(c)(4). Platte was not entitled to a refund because the HDO required the filing and grant of an air hazard amendment on its merits before its application would be ready for grant. Moreover, the chronological order of filing a settlement agreement and a post-designation amendment is irrelevant to whether an applicant may receive a refund since an applicant is not entitled to a refund if an outstanding issue must be resolved on the merits by the ALJ following the application's designation for hearing. See Establishment of a Fee Collection Program, 2 FCC Rcd 947 (1987), reconsidered in part, 3 FCC Rcd 5987, 5989- 5990 (1988); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC Rcd 5919, 5925 (1991).

Accordingly, your request is denied.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 29 1992

Barbara L. Waite, Esquire
Venable, Baetjer, Howard
& Civiletti
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005-3917

Dear Ms. Waite:

This is in response to your request for a hearing fee refund submitted on behalf of Nadine P. Richardson, d/b/a Rocky Mount Broadcasting (Rocky), former applicant for a construction permit for a new FM station on Channel 239A at Greenville, Georgia.

You state that Rocky's application was designated for hearing with that of Orchon Broadcasting Company, Inc. You further state that the parties reached a settlement agreement to resolve this comparative hearing for which approval was sought from the presiding Administrative Law Judge on or before April 30, 1992, the date established for entering Notices of Appearance. You now request that Rocky's hearing fee be refunded.

Section 1.1111(b)(4) of the Commission's rules provides for a hearing fee refund in cases where a settlement agreement, filed by the Notice of Appearance deadline, provides for the dismissal of all but one of the applicants and the surviving application is immediately grantable or if matters specified in the designation order can be deleted. 47 C.F.R. §1.1111(b)(4). In this case, a settlement agreement was filed prior to the Notice of Appearance deadline and approved on June 1, 1992.

Accordingly, your request is granted. A check for $6,760.00, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 20 1992

John S. Neely, Esquire
Miller & Miller
1990 M Street, N.W.
Suite 760
Washington, D.C. 20036

Dear Mr. Neely:

This is in response to your request for a refund of the hearing fee filed by Scott County Communications, Inc. (Scott), former applicant (BPH-900606MB) for a new FM station at Stamping Ground, Kentucky.

Scott and one other applicant filed applications for the station at Stamping Ground. However, prior to designation for hearing, the applicants entered a settlement agreement. The Mass Media Bureau awarded the station to the competing applicant and dismissed Scott's application pursuant to the terms of the agreement.

Section 1.1111(c)(2) states that a broadcast applicant is entitled to a refund whenever its application is dismissed without being designated for hearing. 47 C.F.R. § 1.1111(c)(2). Accordingly, your request is granted.

A check, drawn in the amount of $6,760.00 and made payable to Scott County Communications, Inc., will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 20 1992

Ellen S. Mandell, Esquire
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Dear Ms. Mandell:

This is in response to your request for a refund of the fee filed by Sorenson Broadcasting Corporation, licensee of AM Station KCUE, Red Wing, Minnesota, in connection with its application to correct the geographical coordinates of its station's existing tower.

You state that Sorenson filed its application solely to correct its tower's coordinates and that the station has operated from the same tower for the past 20 years and will continue to operate from that tower. Moreover, you state that a grant of Sorenson's request would be consistent with the Commission's policy to waive the fee for an applicant requesting only to correct the tower coordinates contained in the Commission's records.

We have determined that the public interest in the precise description of the location of an antenna tower outweighs the processing costs that the Commission incurs to correct such errors. See letter to Richard Hildreth from Edward J. Minkel, Managing Director, dated January 17, 1989. We, therefore, find that a grant of your request is warranted where the only change contained in the application is the correction of erroneous tower location information previously on file with the Commission.

Accordingly, your request is granted. A check, drawn in the amount of $565.00 and payable to Sorenson Broadcasting Corporation, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 27 1992

Barbara L. Waite, Esquire
Venable, Baetjer, Howard
& Civiletti
1201 New York Avenue, N.W.
Washington, D.C. 20005-3917

Dear Ms. Waite:

This is in response to your request for a hearing fee refund submitted on behalf of Tri-State Broadcasting (Tri-State), former applicant for a new FM station at Asbury, Iowa.

You state that Tri-State and its sole competitor for the new station at Asbury filed a settlement agreement with the presiding Administration Law Judge prior to the deadline for filing Notices of Appearance, and therefore, Tri-State is entitled to a refund of its hearing fee.

The Commission will refund an applicant's hearing fee if a settlement agreement is filed with the presiding judge by the Notice of Appearance deadline. 47 C.F.R. § 1.1111(b)(4). Our review of this matter discloses that Tri-State timely filed its settlement agreement for purposes of receiving a refund.

Accordingly, a check for $6,760.00, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-268

In the Matter of

Advanced Television Systems
and Their Impact upon the
Existing Television Broadcast
Service

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 16, 1992; Released: August 12, 1992

Comment Date: October 13, 1992
Reply Comment Date: November 12, 1992

By the Commission:

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INTRODUCTION

1. By this action, the Commission is addressing issues relating to the development of channel allotments for advanced television (ATV) service.[2] The Commission is presenting proposals for the policies, procedures and technical criteria to be used in allotting channels for advanced television (ATV) service. Included in this action is a "draft" proposal for an ATV Table of Allotments. The goal of this allotment effort is to provide a 6 MHz ATV channel for each existing broadcast station in a manner that will maximize the coverage of ATV stations, while at the same time taking into account interference to existing NTSC stations and between ATV stations. This is the sixth in a series of Commission actions leading to the implementation of ATV service for the American public.[3]

[2] "ATV" is any television technology that provides improved audio and video quality or enhances the existing NTSC television broadcast system. The existing television service is provided through the "NTSC" system. This system was developed by, and named for, the National Television Systems Committee, an industry group first established in 1940 to develop television broadcast standards. "HDTV" systems are ATV technologies that aim to offer approximately twice the vertical and horizontal resolution of the NTSC system, picture quality approaching that of 35 mm film, and audio quality equal to that of compact discs.

[3] *See Notice of Inquiry*, 2 FCC Rcd 5125 (1987); *Tentative Decision and Further Notice of Inquiry*, 3 FCC Rcd 6520 (1988); *First Report and Order*, 5 FCC Rcd 5627 (1990); *Notice of Proposed Rule Making*, 6 FCC Rcd 7024 (1991); and, *Second Report and Order/Further Notice of Proposed Rule Making*, adopted April 9, 1992, 7 FCC Rcd 3340 (1992).

BACKGROUND

2. On April 9, 1992, the Commission adopted a *Second Report and Order/Further Notice of Proposed Rule Making (Order/FNPRM)* in this proceeding.[4] In that action, we adopted policies and rules regarding a number of legal and policy issues associated with the initial implementation of ATV service by existing TV broadcasters and sought comment on proposals regarding other ATV legal and policy implementation issues

3. In the *Order/FNPRM*, we, *inter alia*, determined that ATV represents a major advance in television technology, not the start of a new and separate video service.[5] We also found that existing broadcasters possess the know-how and experience to implement ATV swiftly and efficiently. We further recognized the value of the service provided by the existing broadcast television industry and its benefits to the public. For these and other reasons, we therefore concluded that broadcasters should have an opportunity to implement ATV and presented a regulatory approach for that implementation.[6] This plan consists of a transition program in which broadcasters will maintain service to existing NTSC receivers until ATV becomes, and is designated as, the prevalent television medium. To facilitate the transition, broadcasters will temporarily be provided with a second channel to allow them to operate both ATV and NTSC services. At the end of the transition period broadcasters will relinquish one of their channels.[7] We described the channel that the broadcasters would keep at the end of the transition period as the "conversion channel" and the channel to be relinquished as the "reversion channel".[8]

4. With regard to ATV allotment policy, in the *Order/FNPRM* we agreed with commenting parties that it is essential that an ATV allotment/assignment process be in place at the time the ATV standard is adopted and that the policies and methodology for this process be defined as soon as possible. The Commission proposed that negotiations should be an integral part of the ATV allotment and assignment process; and that, at the time it proposes a "final" ATV Table of Allotments, broadcasters would be provided a fixed period of time to negotiate and submit plans for pairing NTSC and ATV channels.[9] It further proposed to permit both commercial and non-commercial stations to participate in such negotiations. If there are markets remaining where broadcasters are unable to agree on a pairing plan, the Commission proposed that channels in those markets would be passigned on a first-come, first-serve basis.[10]

5. In the *Order/FNPRM*, the Commission deferred action on a number of issues relating to ATV allotments that were raised by parties filing comments in response to the *Notice of Proposed Rule Making (Notice)* that preceded the *Order/FNPRM*. The Commission stated that it intended to address those and all other, ATV allotment issues in another Further Notice of Proposed Rule Making, *i.e.*, the instant action.[11]

DISCUSSION

6. This Further Notice is the first in the planned series of actions leading to the adoption of a final ATV Table of Allotments. The Commission will consider information from the comments and other sources, such as data from the testing of the proponents' technical systems, in finalizing its ATV allotment policies and preparing its proposal for a "final" ATV Table. Interested parties are also advised that we intend to consider alternative proposals for the underlying principles set forth herein that will guide the development of the ATV Table, and request interested parties to submit specific proposals for such alternative approaches.

7. The purpose of the draft ATV Table of Allotments proposed herein is to aid broadcasters and other interested parties in focusing their comments on the policy proposals presented below. Interested parties are asked to examine this Table in formulating comments and alternative proposals regarding ATV allotment and assignment policy issues. We emphasize that the final ATV Table may change significantly from the Table proposed herein due to factors such as changes to our ATV allotment policy proposals, the final performance characteristics of the ATV technical system, and the results of our international coordination of ATV allotments with Canada and Mexico. We therefore do not seek comments on the specific conversion channel allotments indicated on the draft Table attached to this Further Notice. Rather, it is our tentative plan, at the time we propose the final ATV Table, to provide opportunity for comment on individual channel allotments as well as a specified period of time for broadcasters to negotiate and submit allotment/pairing plans for ATV.[12] Any such negotiated plans would then be included, to the extent practicable, in the final ATV Table that we adopt.

ALLOTMENT POLICY

ATV Allotment Objectives

8. In order to guide the ATV allotment process, we are proposing four broad allotment objectives. These objectives are discussed below in the order of their priority. The application of these objectives to the allotment process is discussed more fully in the section on Allotment Methodology.

9. *Full Accommodation.* In the *Order/FNPRM*, the Commission decided that all existing TV broadcasters will be

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[4] *See Order/FNPRM, supra.*
[5] *Id.*, at paras. 4-6.
[6] *Id.*
[7] *Id.*, at paras. 50-57.
[8] *Id.*, at para. 7.
[9] To the extent possible, we would take into account any negotiated agreements made nationwide or within markets in preparing the "final" Table of Allotments that is adopted.
[10] In the case of applications filed at the same time, we would apply a "random ranking" procedure that would provide the top-ranked applicant with first choice of the available channels, the second-ranked with the next choice and so on.
[11] *Id.*, at para. 32.
[12] Comments on this proposed approach were recently filed in response to the *Order/NPRM*.

eligible for ATV channels.[13] Parties commenting in response to the earlier *Notice* support providing sufficient ATV channel allotments to accommodate all eligible broadcasters. For example, the Advanced Television Systems Committee (ATSC) and the Joint Broadcasters[14] state that it is essential that all existing broadcasters be able to participate in ATV. ATSC endorses a Commission plan to amend the Table of Allotments to provide ATV conversion channels for each local community now served by a local television station.

10. We agree that there should be sufficient ATV allotments to accommodate all eligible broadcasters. This approach would ensure that all broadcasters have an opportunity to participate fully in the transition to the new television technology. This would benefit the public by preserving the service of all the existing TV broadcast stations. In view of the expected expense of implementing ATV service and the need to develop associated programming and production resources, we also believe it is important to minimize the impact of the implementation of ATV on other aspects of the industry's structure. Accordingly, we are proposing that our primary allotment objective be to accommodate all eligible broadcasting entities.

11. *ATV Service Areas.* In comments responding to the Notice, the Joint Broadcasters and other broadcast industry representatives submit that the Commission should base channel pairings, to the greatest extent feasible, on technical and engineering considerations that optimize ATV allotments and maximize service to broadcasters' audiences.[15] The Commission's Advisory Committee on Advanced Television Service (Advisory Committee) takes a similar position in its "Fifth Interim Report."[16] The Joint Broadcasters further submit that the channels necessary for ATV should not be obtained by reducing the size of ATV service areas below that needed to achieve maximum ATV coverage or by creating additional interference to NTSC channels.

12. The Advisory Committee and parties representing a number of broadcast interests, including the Broadcast Caucus, MSTV and others, also suggest an allotment approach that would pair ATV channels with existing NTSC stations based on a "service replication/maximization" plan.[17] Under this approach, the allotment process would attempt to provide ATV coverage areas comparable to existing NTSC coverage areas, taking actual interference into account. Consistent with the comparable coverage objective, the service replication/maximization approach would match ATV channels with existing NTSC channels to create channel pairings/assignments.[18] The goal of this approach would be two-fold: 1) to provide ATV coverage comparable to a station's entire current coverage area and 2) to provide the best correspondence between the size and

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[13] In particular, the Commission decided that parties eligible for ATV channels in the initial assignment period would include all full service TV broadcast station licensees, permittees authorized as of the date of adoption of the Notice and all parties with applications for a construction permit on file as of the date of adoption of the *Notice, i.e.*, October 24, 1991, who are ultimately awarded full-service broadcast station licenses. The Commission further stated that it would allow others to request, *e.g.*, petition for, ATV allotments in communities where there are channels available in addition to those needed for initially eligible parties. *See Order/FNPRM, supra*, at paras. 6-7.

[14] The Joint Broadcasters are a group of 96 broadcast organizations representing licensees, networks and industry associations that filed joint comments.

[15] *See also* Letter to FCC Chairman Alfred C. Sikes, March 10, 1992, signed by the Association of Maximum Service Television, Inc., the Association of America's Public Television Stations, the Association of Independent Television Stations, Inc., CBS, Inc., Capital Cities/ABC, Inc., Fox TV Stations, the National Association of Broadcasters, National Broadcasting Co. and the Public Broadcasting Service (Broadcast Representatives Letter).

[16] *See* "Fifth Interim Report of the Spectrum Utilization and Alternatives Working Party of the Planning Subcommittee of the Advisory Committee on Advanced Television Service" ("Fifth Interim Report of the Spectrum Alternatives Working Party"), February 3, 1992.

[17] This approach is described in a letter to the Chairman of the FCC from its supporting parties dated March 10, 1992. The letter proposes the following specific allotment/assignment principles:

> 1) The allotment/assignment process should start by calculating NTSC coverage based on existing facilities (height and power) and existing sites and taking interference into account, as defined in the Commission's rules.
>
> 2) Without causing new interference to existing NTSC service as defined by the Commission's rules, stations would then be assigned ATV channels that would provide coverage areas no smaller than their current NTSC coverage areas.
>
> 3) Where possible (that is, without causing new interference to existing NTSC service, as defined by the Commission's rules, or preventing other existing stations from achieving ATV coverage comparable to their existing NTSC coverage), existing stations with smaller NTSC coverage areas would be assigned ATV channels that could provide larger coverage areas up to the coverage area of the largest NTSC station in the market.
>
> 4) Where spectrum and interference considerations permit, ATV service areas would be allowed to expand up to the maximum NTSC noise-limited coverage. This could be accomplished by the Commission's establishing maximum power and height limitation for ATV facilities just as it does for NTSC facilities.
>
> 5) Proposed ATV channels would be paired with NTSC channels by seeking the best overall "match" between the NTSC coverage area of existing [stations] and the coverage of the proposed ATV channels to be allotted to each market.

The Advisory Committee indicates its support for this approach in its "Fifth Interim Report of the Spectrum Utilization and Alternatives Working Party," *supra*.

[18] The Advisory Committee, specifically the Working Party on Spectrum Utilization and Alternatives (PS/WP3), is developing an ATV Allotment Table proposal generally on the basis of the service replication/maximization approach. PS/WP-3 indicates that it has developed models and computer software to evaluate the coverage and service areas of NTSC and ATV stations under each of the candidate ATV systems. This software will also be used to fashion alternative allotment tables. PS/WP3 indicates that it plans to have a Table by the Fall of 1992. *See* Broadcast

shape of the proposed ATV channel's coverage area and the station's existing coverage. MSTV argues that the service replication/maximization plan would be "more equitable, more spectrum efficient, more supportive of the rationale that ATV is an enhancement of existing service and more likely to achieve simulcast service" than the first-come/first-served, random selection procedures proposed for determining ATV assignments in the *Order/FNPRM*.[19]

13. On the other hand, representatives of public television stations (Public Television),[20] Fox, Inc. and others submit that, rather than allotting ATV channels based on current NTSC coverage, the Commission should attempt to improve the coverage areas of UHF stations and end the UHF/VHF disparity. These parties propose that the allotment plan be guided by the principle of equalizing ATV coverage within markets.

14. We agree with the commenting parties that it is important to allot conversion channels in a manner that will maximize the service areas of ATV stations to the extent possible. We are concerned, however, that the service replication/maximization objective suggested by the Advisory Committee and others may not be attainable. In particular, we tentatively believe it is likely that a significant number of cases would be encountered in which an acceptable degree of service replication could not be obtained and that all licensees might not be satisfied with the allotments and assignments the plan would produce.[21]

15. We therefore are proposing an approach that would maximize the service areas of all ATV allotments. Along with a general maximization of service objective, we further believe it is important to enable ATV stations to serve geographic areas that encompass their communities of license and surrounding market areas. For this reason, we also intend to establish a minimum ATV service area objective. We believe that, at a minimum, ATV stations should have the capability to provide service to an area within a radius of 85-90 km (about 55 miles) of their transmitter sites.[22] We therefore are proposing that the second primary objective of the ATV allotment process be to attempt to maximize the expected service areas of new ATV stations and to ensure that all such stations are able to meet an 85-90 km minimum service area objective.

16. We also request comment on the service replication/maximization concepts described above. In particular, interested parties are asked to address how, under such a plan, choices regarding allotments and service areas should be made across adjacent markets and densely occupied regions where the choice of channels in one market affects the choice of channels in markets located beyond the minimum spacing requirements through a "daisy chain" process. We further request comment on how NTSC interference-limited coverage should be defined with regard to both the existing NTSC service and the new ATV service, taking into account the fact that many existing stations operate at less than the maximum facilities they could be authorized and could, with a minor modification, increase to the maximum. We emphasize that we plan to provide parties an opportunity to develop and work out allotment and assignment matters with other broadcasters in the negotiation period that will be provided after we propose a final ATV Table.

17. *Use of UHF Channels.* It is our preliminary view that the implementation of ATV service would be enhanced if all ATV operations were located in the same area of the spectrum, in particular, the UHF band. This would help to simplify ATV equipment design and to reduce technical disparities between stations. For example, use of a single contiguous band would simplify the design of TV receivers and antennas by removing the need for tuning signals in more than one band. These simplifications could be expected to lower the cost of consumer TV receiver system equipment.

18. Our ATV allotment studies to date indicate that the majority of ATV conversion channels will have to be allotted from the UHF band.[23] These studies further indicate that only a few VHF channels could be made available in each of the large, congested markets. Generally, we believe the UHF band will prove quite suitable for ATV service. The design of the ATV technical standard is expected to allow ATV UHF stations to serve the same geographic area as NTSC UHF stations, but with substantially less power.[24] This will result in considerable savings in power costs for ATV UHF operations. In addition, the transmission properties of ATV signals and the use of signal processing in ATV receivers should generally render the propagation differences between UHF and VHF frequencies less important. Further, ATV signals are expected to be much less susceptible to multipath and flutter than NTSC signals. We therefore are optimistic that the disparity that currently exists between the UHF and VHF bands will be much less significant for ATV service. In view of

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Representatives Letter, *supra*, and the "Fifth Interim Report of the Advisory Committee on Advanced Television Service," Advisory Committee, March 24, 1992.

[19] *See* Letter to the FCC from MSTV, dated June 2, 1992.

[20] The Association of America's Public Television Stations, the Corporation for Public Broadcasting and the Public Broadcasting Service submitted joint comments.

[21] We expressed these same concerns with regard to the basic concept of the service replication/maximization approach in the *Order/FNPRM*. *See Order/FNPRM*, *supra*, at footnote 91.

[22] The service distances typical of existing NTSC stations range from about 85-105 km (55-65 miles). Some stations, however, have a service distance as short as 30 km (20 miles) and others have a service distance as long as 125 km (80 miles).

[23] In general, these allotments would be made available through use of the channels not now available due to the UHF taboo restrictions. *See* 47 C.F.R. Sections 73.610(d) and 73.698; *see also* "Interim Report: Estimate of the Availability of Spectrum for Advanced Television (ATV) in the Existing Broadcast Television Bands," OET Technical Memorandum, FCC/OET TM88-1, August 1988 and, "Interim Report: Further Studies on the Availability of Spectrum for Advanced Television," OET Technical Memorandum, FCC/OET TM89-1, December 1989. Also, our staff recently generated trial ATV Tables that attempted to allot channels first to VHF frequencies wherever possible and then to UHF frequencies. These trial ATV Tables indicated that, at most, less than one-half of all stations could be accommodated on VHF channels, whereas almost all existing stations could be accommodated on UHF channels. These trial Tables have been placed in the record of this proceeding.

[24] The digital ATV system proponents project that ATV stations will operate with approximately 10 dB less average power than an NTSC station to serve the same geographic area.

these considerations, we propose, as our third ATV allotment objective, to make ATV allotments exclusively to the UHF band.[25]

19. An examination of the proposed ATV Table indicates that very few, *i.e.*, 17, ATV VHF allotments would be needed to achieve full accommodation. We also observe that the few ATV VHF allotments included in this Table are located in areas where there are one or more existing NTSC stations on UHF channels that meet the proposed ATV-to-ATV spacing requirements. We therefore believe that ultimately it will be possible to provide a UHF channel for ATV operation by all of the existing stations that would be assigned ATV VHF allotments. We are proposing special transition provisions to ease the change to ATV for those stations. First, we propose to allow existing NTSC UHF stations assigned ATV VHF channels to switch their NTSC channels to ATV operation before the conversion date.[26] Second, in cases of existing VHF stations or where a direct switch from NTSC to ATV operation by a UHF station otherwise might not be feasible, we propose to make an additional, suitable UHF channel available for the station's ATV operation from the vacated NTSC channels in its area once the conversion occurs.[27] Application for such specially created channels would, of course, be limited for a certain period to existing stations assigned ATV VHF channels in the market. We anticipate that the specific channels to be made available under this policy would be finalized at least two years before the conversion date, so that the affected stations would have adequate time to construct their ATV station and prepare for its operation before the conversion occurs. We request comment on this approach for completing the transition to an all ATV UHF service. Interested parties are also asked to address the point at which early conversion of existing UHF stations to ATV operation should be allowed to occur and to submit proposals for other ways to ease the conversion of ATV VHF stations to UHF channels.

20. We recognize that the all-UHF approach would represent an important change for the television industry. In particular, it would tend to equalize the expected coverage areas and reception characteristics of all stations. Location of all TV stations in a single band could also be expected to reduce or eliminate differences in viewers' perception of stations that might be based on whether stations operate on UHF or VHF channels. Such a change also could affect the current market position of the existing VHF stations. Nonetheless, we tentatively believe the changes in the industry structure that would result from an all UHF service would be beneficial for the public. We request comment on this proposal and its expected impact on the broadcast television industry and television viewers. Alternatively, we seek comment on whether we should maintain some UHF/VHF distinction.

21. *ATV Allotment Preference.* We propose, as our final objective, to give a relative preference to new ATV operations over NTSC operations in the allotment process.[28] In most instances, the choice of channels for an ATV allotment will involve consideration of other nearby ATV allotments and existing NTSC stations. Because ATV is proposed to be the medium for television service in the future, we believe ATV service should be preferred over existing NTSC service. That is, where a choice must be made between providing greater service area for a new ATV allotment or minimizing interference to an existing NTSC allotment, we are proposing to choose in favor of the ATV allotment. We request comment on this proposed objective.

Expected Performance of ATV Systems

22. Our earlier ATV allotment studies indicated that in order to accommodate all existing stations with an ATV channel it would be necessary to locate some co-channel ATV operations at distances to other NTSC and other ATV stations as close as 160 km (100 miles), with perhaps a very few stations at slightly closer spacings. These studies also indicated that ATV to NTSC cochannel spacing is by far the dominant consideration in achieving full accommodation.[29] Our earlier studies further indicated that we will need to eliminate or significantly alter the existing adjacent channel and UHF taboo channel spacing requirements. In particular, these studies indicated that to achieve full accommodation it will be necessary to co-locate or

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[25] In the *Order/FNPRM*, we set forth our plan for implementing ATV service. As part of this plan, we proposed a transition scheme and emphasized that we will reclaim one of the two channels that broadcasters will use during the transition. *See Order/FNPRM, supra*, at para. 50. Our proposal to allot ATV channels only to UHF frequencies would leave the VHF TV channels vacant after the transition to ATV is completed. This would make that band available for new radiofrequency services. Consistent with this proposal, we would not create new ATV allotments on VHF channels after the initial ATV Table is adopted. In discussing our position on switching frequencies between ATV and NTSC channels in the *Order/FNPRM*, we indicated that we would wait until ATV implementation was underway before deciding whether to require or permit broadcasters to switch frequencies. *See Order/FNPRM, supra*, at paras. 56 and 57. Based on the information we have on the expected performance of the ATV technical system and the practical reasons discussed above, we now believe the most appropriate course is to propose to implement ATV as an all UHF service. Under this plan, broadcasters now operating on VHF channels would not be able eventually to switch their ATV and NTSC frequencies. However, we still intend to consider, at an appropriate point in the future, whether to permit broadcasters whose NTSC operations are on UHF channels to switch their ATV and NTSC operations.

[26] In the *Order/FNPRM*, we tentatively concluded that we should establish a date for conversion to ATV service that is 15 years from the date of adoption of an ATV system or a final ATV Table of Allotments is effective, whichever is later. *See Order/FNPRM*, at paras. 52-54.

[27] We anticipate that the inclusion of VHF tuners in ATV receivers will not be a burden during the transition. The market will likely offer a number of models of receivers and converter devices that have the ability to receive and decode both ATV channels and all UHF and VHF NTSC signals.

[28] This preference is intended for allotment purposes only. We would take into account protection of any affected existing NTSC service in actual ATV operations during the transition period. For example, during the transition period we could limit the power of certain ATV stations so that existing NTSC service is not affected. After the conversion date, when NTSC operations cease, the affected ATV stations would be permitted to increase their power.

[29] *See* "Interim Report: Estimate of the Availability of Spectrum for Advanced Television (ATV) in the Existing Broadcast Television Bands," *supra;* and, "Interim Report: Further Studies on the Availability of Spectrum for Advanced Television," *supra*.

reduce spacings between adjacent channels in some instances and to eliminate many of the UHF taboo channels. FCC staff studies of NTSC receiver performance and spectrum availability also indicate that it appears possible to use the UHF taboo channels for ATV service.[30]

23. Understanding these considerations, the proponents of the five HDTV systems being evaluated by the Advisory Committee as candidates for selection as the ATV technical standard have designed their systems to operate at the necessarily closer spacings.[31] The proponents claim that their systems can provide service at 160-184 km (100-115 mile) co-channel station-to-station distances. At these spacings, ATV stations would be able to provide service that extends nearly as far as the service of co-channel NTSC stations located at the current minimum spacings.[32] The system proponents also indicate that their systems can provide this range of service at the closer spacings while causing no more interference to existing NTSC service than is caused by another NTSC station operating at the current minimum spacings for co-channel NTSC UHF stations. These estimates generally are based on system-independent service area planning factors consistent with those recommended by the Advisory Committee.[33]

24. We therefore expect that the technical system chosen as the ATV standard will be able to provide satisfactory service and interference performance at the co-channel spacings we will need to employ in allotting ATV channels. The actual performance capabilities of the proponents' systems are being evaluated by the Advisory Committee.[34] The information from these evaluations will be considered in developing the final ATV Table.

Allotment Methodology and Approach

25. In this section we address the specific methodology and criteria to be used in allotting ATV channels to meet the broad objectives presented above. Interested parties are invited to comment on these proposals and to suggest alternatives.

26. *Use of Spacing Standards.* The Advisory Committee, the Joint Broadcasters and others support use of minimum spacing standards for the allotment of ATV channels. This approach is similar to the approach currently used with NTSC TV and FM radio allotments.[35]

27. We concur with this view and therefore propose to allot ATV channels using geographical spacing criteria in the same manner that we currently allot NTSC TV channels and FM radio channels. This traditional approach has proved to be an efficient, effective means for managing interference between stations and the implementation of new allotments and assignments. Moreover, the geographical spacing approach allows considerable flexibility in the specification of station operating parameters such as power and antenna height in meeting coverage objectives. To maximize the expected coverage areas of ATV stations, our allotment decisions will attempt to optimize the distances between new ATV allotments and between new ATV allotments and existing NTSC stations.

28. *Spacing Proposals.* Consistent with our broad ATV objectives, we are proposing minimum spacing standards that we believe will ensure that ATV stations are able to serve areas comparable to NTSC UHF stations, *i.e.*, areas within 85-90 km of their transmitters. As is the case for NTSC service, the most difficult area for locating ATV allotments is in Zone I, particularly the northeast corridor of the United States. The projected ATV system performance information indicates that our ATV service goals can be achieved through the following minimum spacings:

1) ATV to ATV co-chan. stations- 200 km (125 miles)

2) ATV to ATV adj-chan. stations- More than 88 km (55 miles) or less than 8 km (5 miles)

3) ATV to NTSC co-chan. stations- 184 km (115 miles)

4) ATV to NTSC adj-chan. stations- More than 88 km (55 miles) or less than 8 km (5 miles)

Accordingly, we propose to establish the above criteria as the minimum spacing requirements for ATV stations. Consistent with our goal of maximizing the coverage potential of the ATV allotments, we will endeavor to separate co-channel stations as far as possible, up to a distance of

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[30] *See* "Analyses of UHF TV Receiver Interference Immunities Considering Advanced Television Service," FCC/OET TM88-2 (August 1988); *see also* "Interim Report: Estimate of the Availability of Spectrum for Advanced Television (ATV) in the Existing Broadcast Television Bands," *supra*.

[31] There currently are five technical systems competing to be chosen as the ATV standard: 1) "Narrow-MUSE," from the NHK; 2) "DigiCipher," from General Instrument Corp./American Television Alliance (ATVA); 3) "Digital Spectrum Compatible HDTV" (DSC-HDTV), from Zenith and AT&T; 4) "Advanced Digital-High Definition Television" (AD-HDTV), from the Advanced Television Research Consortium (ATRC); and, 5) "Channel Compatible DigiCipher," from the Massachusetts Institute of Technology/ATVA. A sixth, EDTV system, the ATRC's "Advanced Compatible Television" (ACTV) has been withdrawn from consideration as a candidate for the ATV standard by the proponent. *See Order/FNPRM, supra*, at footnote 3.

[32] A chart showing the proponents' claims of system performance is presented in Appendix A.

[33] The Advisory Committee's Working Party on Spectrum Utilization and Alternatives, PS/WP3, in its "Fifth Interim Report," recommends a series of system independent planning factors for use in evaluating ATV service areas. *See* "Fifth Interim Report of the Spectrum Utilization and Alternatives Working Party of the Planning Subcommittee of the Advisory Committee on Advanced Television Service," *supra*. These planning factors are presented in Appendix B.

[34] In analyzing the service area capabilities of the proponents' systems, one must consider the performance capabilities of the individual system being tested and the planning factors common to all of the systems discussed above. The interference factors to be considered include: 1) the signal-to-noise ratio (S/N) defining the outer limit of service; 2) co-channel desired-to-undesired interference ratios (D/U) for ATV-to-ATV, ATV-to-NTSC and NTSC-to-ATV signals; 3) the upper and lower adjacent channel D/U ratios for these same signal relationships; and, 4) the thresholds of visibility for UHF taboo channels. The first step in the analysis is to determine the power and antenna height combination that causes no more interference intrusion into the service area of a neighboring NTSC station at the minimum spacing distances than would another NTSC station similarly situated under the current rules. The expected noise-free and interference-free service areas of ATV stations can then be determined.

[35] *See* 47 C.F.R. Sections 73.610 and 73.207.

250 km (155 miles).[36] We believe that this approach will balance the overall quality, *e.g.*, expected coverage areas, of the allotments in adjacent markets. We recognize that additional data on spacing needs will be forthcoming from the Advisory Committee's testing process and we will consider that data when it becomes available.

29. The minimum spacings needed between stations on adjacent channels and on channels separated by the UHF taboo relationships will be affected by the selectivity of the tuners used in consumer ATV receivers.[37] We therefore intend to pay careful attention to the Advisory Committee's adjacent and taboo channel testing and the likelihood of building economical tuners to perform to, or improve upon, those results in developing the final table. Based on our own earlier receiver studies, we believe that most of the UHF taboos can be largely ignored in allotting ATV channels. Accordingly, at this time we are not proposing spacing rules to protect for UHF taboo effects.[38] Interested parties are requested to address the relationship between economical tuner designs and acceptable spacings between stations on adjacent and UHF taboo channels and the possible need for maintaining specific taboos.

30. We request comment on the above spacing proposals. Parties suggesting alternative spacing requirements are asked to submit data and analyses that support their proposals. Commenting parties are also invited to examine the forthcoming Advisory Committee data and comment on its implications for minimum spacing requirements. We also request comment on whether it is necessary to specify alternative minimum spacing requirements for Zones II and III, as we do for NTSC service.

31. *Short-spaced Allotments.* Because our primary objective is full accommodation of all existing television stations, our first concern will be spacing stations at distances necessary to provide channels for all existing stations in the initial ATV Table. In implementing this priority with our objective to maximize service areas, our approach will be to attempt, first, to allot channels at distances that meet or exceed the minimum spacing requirements stated above. However, in order to accommodate all existing stations with ATV channels, it will be necessary to locate some allotments at co-channel spacings that are closer than the minimum standards.[39] In fact, it will be necessary to locate some co-channel ATV and NTSC stations as close as 156 km (97 miles) apart.[40] The service range of such short-spaced stations likely will be reduced in the direction of a line between the two stations. Nonetheless, we believe the benefits of providing full accommodation of all existing stations warrant the relatively small loss in total service area that will occur in such cases. We intend to make every effort to minimize the use of short-spacing and its effect on neighboring stations. We also note from the ATV Table proposed herein that most of the short-spaced situations will be between ATV and NTSC stations.[41] As the ATV-NTSC short-spacings will be present only during the transition period, most of the effects on service areas from short spacings will not be present after that time.

32. We also propose to allow short-spaced allotments only during the initial assignment phase for existing stations. Subsequent additions to the ATV Table for stations to be operated by new applicants would be required to comply with the minimum spacing requirements. After the two-year initial application period, we propose to delete all short-spaced allotments that have not been activated by an eligible broadcaster.[42]

33. *Use of Existing Sites.* The Advisory Committee and the majority of broadcasters take the position that ATV channels should be allotted on the basis of current transmitter sites, rather than the reference points of communities.[43] The Joint Broadcasters believe this approach would help maximize the coverage areas of ATV stations, while minimizing potential interference to other, including secondary, stations. These parties further state that deviations in the service areas that are possible within the group of channels available to allot to a given community argue strongly for pairing on the basis of existing transmitters sites. Joint Broadcasters also submit that most stations will find it cheaper and easier to co-locate their ATV transmitters at their existing transmitter sites, and that this would reduce implementation expense and expedite the introduction of ATV service. They acknowledge, however, that some stations will have tower loading problems, at least in the short run, and that others may find their existing sites relatively inferior. Great American Television and Radio Company, Inc. (Great American) requests that the Commission establish procedures that would permit stations, for good cause, to request that their allotment be located at a site different from that of their existing transmitter. Great American points out that in some cases the

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[36] Beyond 250 km (155 miles), the benefits of additional co-channel distance between ATV stations and between ATV and NTSC stations become less important. We note, however, that 80 percent of the allotments in our proposed ATV Table are located such that the nearest co-channel allotment is more than 250 km away.

[37] We have very little analytical data on the expected performance of the proponents' systems with regard to adjacent channel and UHF taboo channel interference. However, some of those system features that will minimize ATV to NTSC co-channel interference would also be expected to minimize ATV to NTSC adjacent channel and taboo channel interference.

[38] Our allotment software allows for the incorporation of taboo protections.

[39] As indicated below in the discussion of proposed ATV Table, approximately six percent of the new ATV allotments would not meet the proposed spacing requirements. Consistent with our broad objectives, we would give a preference to future ATV service over NTSC service. For example, if, in order to achieve full accommodation it is necessary to violate our minimum spacing proposals, we would choose to do so in the ATV-to-NTSC spacings rather than between ATV allotments.

[40] The closest spacings will be in areas such as New York City and Los Angeles where the population of existing stations is most dense. Section II of Appendix D provides more information about where close spacings are likely to be located.

[41] The ATV Table of Allotments presented herein specifies only 14 instances of short-spaced co-channel ATV to ATV spacings.

[42] As decided in the *Order/FNPRM*, eligible broadcasters will have two years to apply for ATV allotments, after which the ATV allotments will be available to any qualified applicant. The ATV application time period will begin to run on the date that a Report and Order adopting the ATV Table of Allotments or selecting an ATV system becomes effective, whichever is later. *See Order/FNPRM, supra*, at paras. 22-25.

[43] The Advisory Committee's position is stated in its "Fifth Interim Report of the Spectrum Utilization and Alternatives Working Party," *supra*.

licensee may not be able to locate a second transmitter and antenna at an existing site or may have identified a preferred alternative site.

34. du Treil, Lundin and Rackley, Inc. (dLR), the Telemundo Group, Inc. (Telemundo) and others ask the Commission to consider clustering ATV allotments at one location in a community to facilitate a common antenna location for stations and thus reduce transmission costs. Telemundo also states that co-location of the ATV operations in an area would eliminate UHF taboo concerns. Bradenton Broadcast Television Company, Inc. (Bradenton) urges that channels be allotted on a "whole market" basis, rather than to the specific communities to which NTSC stations are currently licensed. Bradenton states that this would allow fringe-area stations to compete with the more centrally located stations in their market for the more desirable channels.

35. We agree with those parties who suggest that there are advantages in taking into account existing transmitter locations in the ATV allotment process. Using the locations of the existing transmitters sites as reference points for the initial ATV Table would facilitate more efficient spacing of ATV allotments. It also would ensure that, where otherwise feasible, broadcasters can realize the cost savings from co-locating their NTSC and ATV operations. We disagree with those parties who suggest that all of the channels in a market or community be located at a single site or that channels be allotted on a whole market basis rather than to specific communities. These approaches would reduce allotment flexibility and might tend to limit the number of channels that could be allotted. Moreover, we see no reason to expect that all the stations in a market would generally seek to operate their ATV service from a common location. Accordingly, we propose to allot ATV channels on the basis of current transmitter sites, rather than community reference points. The current NTSC transmitter sites would be used to develop the ATV Table and to determine whether potential ATV allotments meet the proposed minimum separation requirements. We request specific comment regarding any circumstances where it might be desirable to evaluate ATV allotments on the basis of sites other than those occupied by existing TV stations.

36. For purposes of this proposal, we would assume that an existing site location is the area within a three-mile radius of the actual transmitter location. In accordance with our established practice for broadcasting, we propose to permit a licensee to operate its ATV station at a site different from that of its NTSC operation where the alternate sites would meet the proposed ATV minimum spacing requirements and the station would continue to serve its community of license. Such site relocations could include movement to a common local TV transmission site.

Other Allotment Policy and Process Issues

37. *Existing Vacant Allotments and New Applications.* dLR submits that all commercial TV allotments that are not currently being used or for which there are no pending applications should be deleted from the existing TV Table of Allotments. dLR also asks the Commission to extend the current freeze on acceptance of applications in the most densely occupied markets.[44] Joint Broadcasters state that the Commission must at some point "freeze" the pool of eligible existing stations and the locations of those stations. They further state that a limited exception to this freeze might be appropriate for new NTSC noncommercial stations in areas not yet receiving noncommercial service. MSTV, in reply comments, submits that the Commission should institute a freeze, *for planning purposes only*, on all modifications of existing stations' technical and engineering parameters that could affect the determination of both existing and proposed HDTV coverage and interference areas. Under this suggestion, licensees would, in fact, be allowed to seek modifications that would affect their coverage and interference areas. The Commission would ignore any such changes in its planning work, however. MSTV says the "planning freeze" would allow the Commission to design ATV allotments with a first priority of achieving coverage comparable to NTSC coverage.

38. We see no need to implement dLR's suggestion to delete from the existing TV Table of Allotments all commercial TV allotments that are not currently being used or for which there are no pending applications. It does not appear necessary to eliminate all of the existing vacant NTSC allotments in order to implement our ATV plan. We also see no need to impose a general "freeze" on the pool of NTSC stations eligible for ATV channels or on the locations of existing stations. As noted above, we have already issued an *Order* freezing applications for new stations in the 30 major cities where our earlier studies indicated that a shortage of spectrum for operation of ATV stations might exist.[45] We continue to believe there is adequate spectrum available in markets outside these 30 to accommodate ATV channels. Thus, the existing freeze appears adequate to ensure that spectrum is available for ATV channels. Similarly, we see no purpose in employing MSTV's "planning freeze" with regard to modifications of existing stations. Accordingly, as indicated in the *Order/FNPRM*, we will accept applications for new NTSC stations during the course of the development of the ATV Table and until the end of the initial ATV assignment process.[46]

39. We propose, however, to delete vacant NTSC commercial allotments where necessary to facilitate creation of an ATV allotment. To the extent that it would be necessary to displace specific existing vacant allotments to create an ATV allotment, we would not accept applications for those existing allotments. This policy would become effective at the time we propose the final ATV Table of Allotments.

40. In keeping with our decision in the *Order/FNPRM*, we will attempt to maintain existing vacant noncommercial NTSC allotments and to provide new ATV

[44] In conjunction with the *Notice of Inquiry* in this proceeding, *supra*, the Commission also issued an Order freezing applications for new television stations and requests for new television allotments in the 30 major cities where a shortage of broadcast spectrum might exist for ATV channels. *See Order*, RM-5811, Mimeo No. 4074, released July 17, 1987.

[45] *See Order*, RM-5811, Mimeo No. 4074, released July 17, 1987.

[46] *See Order/FNPRM*, *supra*, at para. 48.

channels for such allotments.[47] We will eliminate vacant noncommercial allotments only where no feasible alternative exists for allotting ATV channels for eligible broadcasters. We also will provide vacant noncommercial reserved allotments with an ATV channel except where all of the available ATV allotments are needed by existing broadcasters and careful engineering analysis reveals no other practicable alternative.

41. *Low Power and TV Translator Stations.* In the *Order/FNPRM*, we determined that if ATV is to succeed, it will be necessary for new ATV assignments to displace low power TV (LPTV) and TV translator stations to some degree in the major markets. We observed that the impact on low power stations is likely to be less severe in rural areas where there are fewer full-service stations.[48] This determination was based on studies by our staff and the Advisory Committee that indicate there is insufficient spectrum available in the broadcast TV bands to factor in low power displacement considerations in making ATV assignments. We observed that, in fact, it will be a challenge just to provide all full-service licensees with an additional 6 MHz for ATV. We therefore reluctantly concluded that we must continue LPTV and TV translators secondary status vis-a-vis ATV stations. In view of the important benefits that LPTV and TV translators provide to the public, we also took a number of steps to mitigate the likelihood and effects of displacement on low power stations.[49]

42. Consistent with the determinations and actions in the *Order/FNPRM*, the ATV allotment process generally will not attempt to protect low power stations from interference from potential ATV stations.[50] Also, as indicated in the *Order/FNPRM*, some of these stations, particularly those in the more congested areas of the nation, may be required to make changes in their operation, including the possibility of ceasing operation, to avoid interference to ATV stations.

43. *Use of TV Channels 3 and 4.* In its reply comments, MSTV submits that, because Channels 3 and 4 are used as the output frequencies of cable terminal equipment and VCRs, caution should be exercised in allotting both of these channels to the same community. MSTV is concerned that cable terminal equipment and VCRs may be vulnerable to interference from ATV signals operating on the output channels used by this equipment.

44. Although at this time we are proposing to use the UHF frequency band for ATV and the proposed ATV Table does not use TV Channels 3 and 4, we are aware of the potential interference concerns mentioned by MSTV with regard to use of these channels in the same community. In general, we believe the output signal levels of cable terminal devices and VCRs can be expected to be significantly higher than the off-air levels of an ATV signal on the frequency on which this equipment would operate. Moreover, the amplified output signal of cable terminals and VCRs would be coupled by cable directly to the input terminal of a TV receiver's tuner circuit. The interfering ATV signal, on the other hand, would be present only through direct pickup within the TV receiver itself, and therefore would be at significantly lower level of power. An off-air ATV signal is therefore not likely to interfere with the operation of a cable terminal or VCR. Conversely, if the connection between the output of a cable terminal or VCR and a TV receiver is properly shielded, the output signal will not interfere with reception of off-air signals through the VCR, suitably equipped cable terminal or other device for switching program sources. Thus, we believe that Channels 3 and 4 generally can be used for NTSC and ATV operations in the same area without conflicting with the operation of cable terminal devices and VCRs. Nonetheless, if it is decided to use the VHF frequencies for ATV, we propose to avoid the allotment of both Channels 3 and 4 within the same community wherever possible.

45. *TV Channel 6 Allotments.* If we decide to use the VHF channels for ATV, we will need to protect against possible interference from TV channel 6 operations to FM radio service on FM channel 253 and to TV channel 6 from FM radio service on noncommercial educational FM channels 201-220. To avoid situations where such interference could arise, we propose to make ATV allotments to TV channel 6 only where there is no other readily available allotment opportunity that would meet the minimum spacing requirements. We propose to apply an appropriate standard similar to that currently specified in the rules to protect against interference between NTSC Channel 6 and FM radio.[51] We note the sample ATV Table set forth herein does not use channel 6 for any ATV allotments.

46. *Land Mobile Sharing Channels.* We also need to protect against possible interference between ATV stations and land mobile operations on TV broadcast frequencies in certain areas. The rules authorize land mobile sharing

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[47] *See Order/FNPRM, supra*, at paras 33-35.

[48] *See Order/FNPRM, supra*, at para 39.

[49] *Id.*, at para 40. In particular, we stated that we will continue to permit a LPTV station displaced by a full-service station to apply for a suitable replacement channel in the same area without being subject to competing applications. We further indicated that we will continue our present policy of permitting LPTV stations to operate until a displacing ATV station is operational. We next stated that we will permit LPTV stations to migrate to vacant NTSC channels, including vacant reserved noncommercial channels. We also stated that we would continue to allow LPTV and TV translator stations to file non-window displacement relief applications to change their operating parameters to cure interference to an ATV station. Finally, we tentatively agreed with commenting parties who suggested that certain specific NTSC interference protection rules could be re-evaluated to afford low-power interests some relief. We indicated that we plan to initiate a separate proceeding to consider such changes. *Id.*, at para. 45.

[50] Island Broadcasting (Island), the licensee of three low power TV stations operating in the New York City metropolitan area and on Long Island, in a recent letter to the Commission, states that it may be possible to provide an ATV channel for all of the existing full service TV stations in the New York market without displacing any of the existing LPTV/translator stations in the area. Island includes an illustrative ATV channel allotment table for the New York City area that would not use any of the existing LPTV and TV translator channels. Where feasible, a number of Island's proposals were incorporated in preparing the sample ATV Table of Allotments proposed herein.

[51] The rules regulating TV channel 6 and FM radio interference are set forth in 47 C.F.R. 73.207(c), 73.525 and 73.610(f). We note that TV channel 6 is restricted with respect to the IF separation to FM channel 253 (Section 73.610(f) of the rules). Commercial FM stations on channel 253 and noncommercial educational FM stations on FM channels 201-220 must protect TV channel 6. There are no restrictions on new TV channel 6 stations or changes with respect to FM channels 201-220.

operations on frequencies in the range of UHF channels 14-20 in 13 urbanized areas, the Gulf of Mexico offshore region and Hawaii.[52] Because ATV stations are expected to operate with 10 dB less power than NTSC stations, we believe we can allow ATV stations to be located somewhat closer to land mobile operations than is permitted under our current policy.[53] Generally, we believe that it would be possible to allow ATV stations to operate at co-channel and adjacent channel spacings to the city-center of land mobile operations as close as 250 km (155 miles) and 176 km (110 miles), respectively. We request comment on whether these shorter spacing standards would adequately protect against interference between land mobile operations and ATV stations. We also invite interested parties to submit proposals for alternative minimum spacing requirements for ATV and land mobile stations.

47. All but one of the allotments on the draft ATV Table would comply with the proposed 155 mile co-channel spacing requirement between ATV allotments and land mobile operations. That is, only one of the ATV allotments on this Table would be short-spaced with respect to co-channel land mobile operations. The draft Table does, however, include five cases where ATV allotments would be located at distances less than 110 miles from the city-center of an adjacent channel land mobile system.[54] In order to achieve full accommodation of all existing TV broadcasters, it may be necessary to make special accommodations in the few situations where short-spacing is necessary between ATV allotments and land mobile service. Such accommodations could take the form of conditions on either ATV or land mobile operations in the affected areas. We request comment and information regarding the specific conditions to be applied in such types of cases and the manner in which such conditions should be applied to achieve an appropriate balance between ATV and land mobile interests.

48. In the case of Detroit and Cleveland, our existing border agreements with Canada preclude activation of land mobile stations on UHF channels in those markets. It also appears that it would further our full accommodation and service area goals to use the land mobile reserved channels in these markets for ATV. Accordingly, we are proposing to make Channels 15 and 16 in Detroit and Channels 14 and 15 in Cleveland, which are now reserved for land mobile use, available for allotment as ATV channels.

International Coordination

49. We have initiated coordination activities with both the Canadian and Mexican governments for proposed ATV allotments in the border areas. We expect to address coordination arrangements with these governments for ATV allotments in the border areas in a time frame consistent with our allotment and assignment schedule.

ATV TABLE OF ALLOTMENTS

50. *Allotment Computer Software.* The development of an ATV Table of Allotments that attempts to optimize and balance the various policy objectives and proposals discussed above is a large and complex task. To handle this task, the FCC staff has developed ATV allotment computer software that incorporates an optimization methodology known as "simulated annealing."[55] This methodology employs a system of penalties that attach to conditions that fall short of specified objectives. The simulated annealing method seeks to minimize the sum of these penalties, or "costs," to achieve an optimum condition.

51. In developing the ATV allotment software, the staff was aware that there may be many instances where the allotment of channels in specific local situations can best be resolved on a case-by-case basis. Our allotment software therefore is able to merge specific local designs into complete tables and, where necessary, make necessary changes in other allotments to preserve a balance of the specified

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[52] *See* 47 C.F.R. Section 2.106, Notes NG66, NG114 and NG127. The 13 urbanized areas where UHF channels may be used for land mobile operations and the channels set aside for such operations in those areas are:

	TV Channel
New York-Northeastern New Jersey	14, 15
Los Angeles	14, 16, 20
Chicago-Northwestern Indiana	14, 15
Philadelphia, PA-New Jersey	19, 20
Detroit, MI	15, 16
San Francisco-Oakland, CA	16, 17
Boston, MA	14, 16
Washington, DC-Maryland-Virginia	17, 18
Pittsburgh, PA	14, 18
Cleveland, OH	14, 15
Miami, FL	14
Houston, TX	17
Dallas, TX	16

[53] Currently, the Commission's practice is to evaluate petitions for rule making requesting new television allotments on the same channel as, or first adjacent channel to, a channel used in a nearby area for land mobile service on a case-by-case basis. In these case-by-case evaluations, spacing standards derived from policy statements in Docket No. 18261 are used. The transmitter site of a new TV station must be at least 212 miles from the city-center of a co-channel land mobile operation, and at least 140 miles from the city-center of an adjacent channel land mobile operation.

[54] These five cases are shown in Section II of Appendix D.

[55] See David S. Johnson, Cecilia R. Aragon, Lyle A. McGeoch and Catherine Schevon, "Optimization by Simulated Annealing: An Experimental Evaluation, Part II (Graph Coloring and Number Partitioning)," *Operations Research*, Vol. 39, May-June 1991. In addition to the simulated annealing software, the staff has obtained software that incorporates a method known as "La Grangian Relaxation." This method and its software implementation were developed by Decision-Science Applications, Inc. (DSA) under contract to the FCC. The DSA ATV allotment software is an extension of earlier work by DSA that produced the computer software used by the FCC to develop new FM radio allotments in MM Docket No. 80-90. The DSA software complements the simulated annealing software, and partial allotment solutions developed through either software package can be used in the other so that the two packages can be used together.

policy considerations. This capability will allow us to incorporate allotment/pairing agreements that broadcasters may reach in any negotiated settlements.[56]

52. *Proposed Allotment Table.* A proposed "first draft" ATV Table is presented in Appendix D. This Table shows possible ATV allotments for all existing U.S. TV transmitter sites. It is intended for the purpose of enabling interested parties to evaluate how the planning principles proposed herein would be applied to generate an ATV Table of Allotments. We emphasize that the "first draft" ATV Table may differ significantly from the final ATV Table, depending on which principles are ultimately used to generate the table, which ATV system is ultimately selected by the Commission, and the results of any broadcaster negotiated settlements. The results of the "first draft" ATV Table are discussed below.

53. Full Accommodation. The proposed Table provides for full accommodation of all existing broadcasters.[57] [58] The Table proposes 1793 new ATV allotments in 881 communities in the continental U.S.[59] This would provide a second ATV channel for all eligible broadcasters as defined in the *Order/FNPRM*.[60] [61] We therefore believe this Table meets our primary objective of full accommodation.

54. *ATV Service Areas.* The proposed Table also maximizes the potential service areas of the new ATV stations. The great majority of ATV allotments are spaced beyond the minimum 125 mile ATV-to-ATV and 115 mile ATV-to-NTSC spacing distances the system proponents claim to need, and we are proposing, to provide service areas equivalent to those of NTSC stations spaced at the current minimum distances. In fact, 80 percent of all proposed ATV allotments would be spaced at distances greater than the existing NTSC minimum spacing requirements, *i.e.*, 250 km (155 miles). Only eight percent (138 ATV allotments) of the total proposed ATV allotments do not meet the proposed minimum co-channel spacing requirements. Many of those allotments would be short-spaced by only a few miles.[62] In addition, the minimum short-spacing distances identified in the Table, 107.3 miles for ATV-to-ATV and 97.1 for ATV-to-NTSC, appear adequate to enable stations to provide a reasonable range of service in the affected direction. The proposed Table also minimizes the number of adjacent channel allotments that are spaced at distances of more than five miles and less than 55 miles. Only 228 adjacent channel spacings, or about 12 percent, would be within the 5 to 55 mile range.

55. *Use of UHF Channels.* Consistent with our proposed objective to use UHF frequencies only, all but 17 of the proposed new ATV allotments would be on UHF frequencies. This represents over 99 percent of the total proposed ATV allotments. Further, we believe it may be feasible to develop a transition scenario that would permit the conversion of these few cases to ATV operation in the UHF band. For example, in all 17 cases, UHF frequencies are allocated to those communities for NTSC service. These NTSC UHF frequencies generally would meet our proposed minimum ATV spacing and could be converted from NTSC operation to ATV operation.

56. *ATV Allotment Preference.* The proposed ATV Table also meets our ATV preference objective. Of the 107 co-channel shortspaced cases, only 14 would be between proposed new ATV allotments; the remainder would be between proposed ATV and existing NTSC allotments. Of the 228 ATV allotments that do not meet the adjacent channel requirement, only four would involve ATV-to-ATV spacings. Accordingly, we believe that most ATV service area concerns would be eliminated or minimized after the transition period.

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[56] It may not be possible to incorporate the allotments specified in a given local agreement into the overall Table and still meet the specified policy criteria. For this reason, all negotiated allotment/pairing agreements submitted by broadcasters will be carefully reviewed and evaluated by this Commission.

[57] The single exception is in Puerto Rico, where more than half the TV broadcasting channels are already allotted (34 channels are operating or have been awarded construction permits on an island whose size does not normally permit frequency reuse. There are only 67 channels in the TV broadcasting bands). In developing the proposed allotments for Puerto Rico, we gave first priority to the operating stations, as proposed in the *Order/FNPRM*. *See Order/FNPRM, supra,* at para. 9. This leaves a small number of eligible stations now with only construction permit status. Of the latter, only Fajardo Channel 34 is in a multi-station community. We therefore chose to provide Fajardo with only two ATV allotments for the three stations there. In making this choice, we also considered that Fajardo is at the east end of the island, which affords the best chance of duplicating a west-end ATV channel through application of case-by-case engineering analysis.

[58] We also note that some of the channels specified in the proposed table are not fully compliant with the existing U.S.-Mexican agreement. For full compliance, a number of ATV stations along the border would have to be sited somewhat north of tower sites now in use. The following list explains those particular situations. *San Diego, CA:* This community has six stations, two at a site northwest relative to the other four. Six ATV channels have been listed in the allotment table for San Diego, but all of these must be near the northwestern site for compatibility with the Mexican agreement. *El Paso, Texas:* This community has eight stations, five of which are allotted ATV channels which may be sited on or near existing towers. The remaining three El Paso ATV allotments would have to broadcast from sites farther north of the border to comply with UHF taboo restrictions in the U.S. Mexican agreement. *Laredo, Texas:* This community has three stations, one of which would have to broadcast from a tower north of current towers. *Brownsville, Texas:* Of the six stations along the Rio Grande near Brownsville (serving the communities of McAllen, Harlingen, Weslaco and Brownsville), four may use their ATV assignment at or near the towers currently in use. We will work with the Mexican government to clarify the status of ATV allotments in the above areas.

[59] The proposed ATV Table also includes allotments for Alaska, Hawaii, Puerto Rico and the Virgin Islands. With these additional allotments, the Table provides a total of 1886 allotments in 914 communities.

[60] See *Order/FNPRM*, at para. 8. The proposed Table provides facilities for all eligible parties as of October 24, 1991.

[61] The proposed ATV Table also reflects the general policies for noncommercial stations stated in the *Order/FNPRM*. The proposed ATV Table provides ATV allotments for all existing noncommercial stations and 170 currently vacant NTSC noncommercial allotments. With these 170 allotments there would be ATV channels for about half of the approximately 350 currently vacant non-commercial NTSC allotments.

[62] The second section of Appendix D shows the short-spaced co-channel allotments. It also shows adjacent channel allotments that are within 5 to 55 miles of an adjacent channel.

PROCEDURAL MATTERS

57. This action is being taken pursuant to authority contained in Sections 4(i), 7, 301, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157, 301, 302, 303 and 307. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

58. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

59. *Submission of Comments.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **October 13, 1992** and reply comments on or before **November 12, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

60. For further information regarding this Notice of Proposed Rule Making, contact Alan Stillwell (202-632-7060) or Robert Eckert (202-653-8163), Office of Engineering and Technology, or Gordon Godfrey (202-632-9660), Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Concurring Statement of Commissioner James H. Quello

In re: **Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service (MM Docket No. 87-268)**

The significance of this item is its "first draft" Table of Allotment for ATV. This draft Table is based on the proposed objective of having all ATV allotments in the UHF band. I do not support the proposed objective of an all UHF ATV allotment. As the Commission stated earlier in this proceeding, licensees should have the flexibility of providing ATV service on their original 6 MHz or on the newly allotted 6 MHz assuming such flexibility was feasible within their markets. Proposing all ATV service be on the UHF band does not take into consideration the effects on VHF station value and service areas vis-a-vis UHF stations. I recognize that the VHF band cannot accommodate all ATV allotments, however, to propose to relegate ATV solely to the UHF band is unnecessarily premature.

Furthermore, I have difficulty with the proposed objective of determining that allotments should favor the maximization of ATV over the opportunity of matching ATV contours with current NTSC contours. In my opinion, the preferred objective should be to leave the options open at this time on whether to base allotments on matching service contours or maximization of ATV service. I am cognizant of industry efforts to develop such an allotment plan, and hopefully the industry's plan will be submitted during the course of this proceeding.

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APPENDIX A
Estimates of HDTV Service Areas

The proponents of the HDTV systems being considered by the FCC's Advisory Committee on Advanced Television Service provided estimates of the range of the service areas of their systems under various interference conditions in their system description documentation. The analyses that generated these estimates were based on the assumption that the desired ATV service area will be the same as the Grade B contour of a NTSC UHF station operating at full authorized power (37 dBk) and a "typical" effective antenna height of 1200 feet above average terrain and that the Grade B coverage of such a station is 56 miles. The proponents assume that ATV to NTSC interference will be the same as that which occurs between typical co-channel NTSC UHF stations at the minimum spacing distance of 155 miles (the interference results in a 15 mile reduction of service range in the direction of the interfering station). The estimates of service area range are:*

	Zenith/ AT&T	GI/ ATVA**	ATRC	MIT/ ATVA
Noise Limited (miles)	56	56	56	n/a
Co-Channel Interference				
ATV-NTSC Spacing				
100 miles-		41	50	
112 miles-	45		54	
115 miles-		45	55	
128 miles-		52		
ATV-ATV Spacing				
125 miles-	52	51	51	

* Blank entries appear where the proponent did not provide estimates.

** System operating in the 32 QAM mode.

APPENDIX B
SYSTEM INDEPENDENT PLANNING FACTORS
RECOMMENDED BY THE ADVISORY COMMITTEE
(Interim Estimates)

Planning Factor	Low VHF	High VHF	UHF
Geometric mean frequency (MHz)	69	194	615
Dipole factor (dBm-dBu) dB (K_d)	-111.8	-120.8	-130.8
Thermal noise (dBm) (N_t)	-106.2	-106.2	-106.2
Antenna Gain (dB) (G)	4	6	10
Downlead line loss for 50 of coax (dB) (L)	1	2	4
Front-to-back ratio (dB) (ratio of forward gain to maximum response over rear 180°)	10*	12*	14*
Receiver noise figure (dB) (N_R)	5**	5**	10**
Time probability factor for 90% availability (dB) (dT)			***
Location probability for (dL) 50% availability (dB)	0	0	0

* For the receiving antenna manufacturer's objectives the values are 14, 16, and 20.

** Possible changes in the VHF figures are still under consideration.

*** The time probability factor is defined as the difference F(50,10) minus f(50,50), where these two values are determined from the FCC charts in Section 73.699. This factor is a function of the distance between the transmitting and receiving antennas.

See "Fifth Interim Report of the Planning Subcommittee of the FCC Advisory Committee on Advanced Television Service," March, 1992

APPENDIX C
INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

In this rule making action the Commission presents proposals for the policies, procedures and technical criteria that it will use in allotting channels for broadcast ATV service.

Objectives

The objective of this action is to obtain comment and information that will assist the Commission in allotting ATV channels. The Commission's objective is to allot ATV channels in a manner that is most efficient for broadcasters and the public and least disruptive to broadcast television service during the period of transition from NTSC to ATV service.

Legal Basis

The proposed action is authorized under Sections 4(i), 7, 301, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157, 301, 302, 303 and 307.

Reporting, Recordkeeping and Other Compliance Requirements

The proposals set forth in this action would involve no changes to reporting, recordkeeping and other compliance requirements beyond what is already required under the current regulations.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact and Number of Small Entities Involved

The ATV Table of Allotments that will ultimately be developed through the series of activities beginning with this action will affect all of the 1716 commercial and noncommercial broadcast television stations eligible for an ATV channel in the initial transition phase. Many of these stations are small entities. It is expected that these allotments will constitute the population of channels on which broadcasters will operate ATV service in the future. The individual ATV channels that appear on the final Table may not all offer the potential for the same degree of geographic coverage broadcasters will seek to serve. Allotment of these channels is therefore expected to be very important to the broadcast community. All of the affected stations will have to obtain new transmission facilities and, to a varying extent, production equipment to operate on the new ATV channels. The cost of equipment to operate on these new channels is expected to

vary from $750,000 upwards to $10 million. The actual cost of equipment is expected to vary in accordance with the degree to which the station becomes involved in ATV programming and origination.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with Stated Objectives

The process of allotting the ATV channels is an optimization task that offers a great number of possible alternative "mixes" of channel allotments for each community. In evaluating the merits of allotment alternatives, the Commission intends to make every effort to accommodate the needs and concerns of all affected parties. The ATV Table of Allotments proposed herein is a "first draft" intended to provide broadcasters with a view of how channels might be allotted across the individual TV markets. We fully expect that the final Table that is adopted will contain many revisions of the allotments proposed herein.

APPENDIX D

Section I of this Appendix presents a sample ATV Table of Alotments. This table shows proposed ATV allotments for all existing U.S. TV transmitter sites. It is intended for the purpose of enabling interested parties to evaluate how the proposed planning principles would be applied to generate an ATV Table of Allotments. We emphasize that this table may differ significantly from the final ATV Table, depending on which principles are ultimately used to generate the table, which ATV system is ultimately selected by the Commission, and the results of any broadcaster negotiated settlements.

Section II identifies proposed ATV allotments on the ATV Table that do not meet the proposed minimum spacing requirements.

Section I - Proposed ATV Table of Allotments

Note: The channels are listed in numerical order; no pairing of NTSC and ATV channels is implied.

SAMPLE TABLE

Alaska

Community	ATV Channel Number
Anchorage	
Site 1	46, 52, 53
Site 2	50, 62, 69
Site 3	42
Site 4	67
Bethel	65
Dillingham	38
Fairbanks	28, 52, 69
Juneau	61, 66
Ketchikan	34
North Pole	54
Sitka	18

Alabama

Community	ATV Channel Number
Anniston	27
Birmingham	46, 50, 53, 58, 63, 69
Demopolis	62
Dothan	
Site 1	63, 69
Site 2	30
Dozier	36
Florence	38, 52, 67

*** SAMPLE TABLE ***

Alabama (Continued)

Community	ATV Channel Number
Gadsden	
Site 1	16
Site 2	24
Homewood	35
Huntsville	
Site 1	34, 41, 49, 64
Site 2	51
Louisville	15
Mobile	
Site 1	29
Site 2	17, 27
Site 3	55, 61
Montgomery	
Site 1	57
Site 2	19, 29
Site 3	47
Site 4	49
Mount Cheaha	55
Opelika	51
Ozark	41
Selma	52
Troy	65
Tuscaloosa	
Site 1	61
Site 2	28
Tuskegee	23

Arkansas

Community	ATV Channel Number
Arkadelphia	34
El Dorado	
Site 1	67
Site 2	59
Fayetteville	
Site 1	68
Site 2	56
Fort Smith	
Site 1	43
Site 2	54
Site 3	57
Harrison	45
Hot Springs	
Site 1	55
Site 2	66

*** SAMPLE TABLE ***

Arkansas (continued)

Community	ATV Channel Number
Jonesboro	
Site 1	26
Site 2	20
Site 3	51
Little Rock	
Site 1	30, 60, 61
Site 2	32, 58
Site 3	41
Site 4	49
Mountain View	39
Newark	44
Pine Bluff	
Site 1	21
Site 2	69
Rogers	50
Russellville	47

Arizona

Community	ATV Channel Number
Ajo	64
Douglas	36
Flagstaff	
Site 1	22, 56
Site 2	38
Site 3	28, 68
Globe	55
Green Valley	39
Holbrook	20
Kingman	
Site 1	29
Site 2	65
McNary	54
Mesa	57
Nogales	
Site 1	66
Site 2	32
Page	44
Parker	23
Phoenix	
Site 1	24, 29, 36, 42, 43, 52, 58, 59, 63
Site 2	67
Prescott	
Site 1	48
Site 2	41

* SAMPLE TABLE *

Arizona (continued)

Community	ATV Channel Number
Tolleson	30
Tucson	
Site 1	23, 49, 65, 68
Site 2	60, 62
Site 3	44
Yuma	
Site 1	22, 26
Site 2	69

California

Community	ATV Channel Number
Anaheim	53
Arcata	14
Avalon	64
Bakersfield	
Site 1	44, 54, 67
Site 2	27, 36
Barstow	41
Big Bear Lake	51
Bishop	40
Ceres	22
Chico	
Site 1	60
Site 2	48
Site 3	56
Clovis	41
Coalinga	42
Concord	43
Corona	26
Cotati	23
El Centro	
Site 1	40
Site 2	58
Eureka	
Site 1	19, 20, 43
Site 2	38
Fort Bragg	41
Fresno	
Site 1	34, 69
Site 2	32, 66
Site 3	64
Hanford	57
Huntington Beach	39
Los Angeles	3, 25, 31, 32, 35, 38, 47, 48, 60, 65, 66, 69
Merced	63

*** SAMPLE TABLE ***

California (continued)

Community	ATV Channel Number
Modesto	50
Monterey	
Site 1	52
Site 2	31
Novato	19
Oakland	45
Ontario	10
Oroville	63
Oxnard	49
Palm Springs	54, 68
Paradise	69
Porterville	50
Rancho Palos Verdes	36
Redding	34, 54
Riverside	15
Sacramento	
Site 1	24, 25, 35, 47, 55, 62
Site 2	14
Salinas	
Site 1	28
Site 2	58
San Bernardino	
Site 1	43, 55
Site 2	19
San Diego	
Site 1	9, 55, 63, 65
Site 2	16, 25
San Francisco	21, 27, 29, 30, 34, 39, 51, 56, 57, 61
San Jose	
Site 1	49, 53, 69
Site 2	12, 63
San Luis Obispo	19, 56, 60
San Mateo	59
Sanger	38
Santa Ana	61
Santa Barbara	
Site 1	24, 41
Site 2	18
Santa Maria	30
Santa Rosa	65
Stockton	
Site 1	46, 67
Site 2	41
Susanville	51
Twentynine Palms	46
Vallejo	33
Ventura	59

*** SAMPLE TABLE ***

California (continued)

Community	ATV Channel Number
Visalia	15, 62
Watsonville	40

Colorado

Community	ATV Channel Number
Alamosa	38
Boulder	39
Broomfield	44
Castle Rock	64
Colorado Springs	16, 23, 58
Craig	32
Denver	
Site 1	17, 28, 30, 34, 35, 46, 48, 66
Site 2	55
Site 3	57
Durango	25, 55
Fort Collins	56
Glenwood Springs	
Site 1	54
Site 2	68
Grand Junction	
Site 1	57, 62
Site 2	28
Gunnison	49
La Junta	68
Lamar	19
Leadville	27
Longmont	69
Montrose	36, 60
Pueblo	33, 63
Steamboat Springs	58
Sterling	
Site 1	15
Site 2	43
Trinidad	25

Connecticut

Community	ATV Channel Number
Bridgeport	
Site 1	39
Site 2	12
Hartford	29, 32, 35, 63
New Britain	34

*** SAMPLE TABLE ***

Connecticut (continued)

Community	ATV Channel Number
New Haven	
Site 1	46
Site 2	52
Site 3	17
New London	50
Norwich	9
Waterbury	60

District of Columbia

Community	ATV Channel Number
Washington	29, 30, 34, 35, 36, 48, 57, 59

Delaware

Community	ATV Channel Number
Seaford	33
Wilmington	
Site 1	36
Site 2	68

Florida

Community	ATV Channel Number
Boca Raton	50
Bradenton	42
Bunnell	38
Cape Coral	24
Clearwater	25
Clermont	23
Cocoa	33, 47
Daytona Beach	
Site 1	69
Site 2	54
Fort Lauderdale	40
Fort Myers	41, 54, 55
Fort Pierce	
Site 1	48
Site 2	22
Fort Walton Beach	
Site 1	38
Site 2	31
Site 3	59

*** SAMPLE TABLE ***

Florida (continued)

Community	ATV Channel Number
Gainesville	
Site 1	34
Site 2	32
High Springs	68
Hollywood	19
Inverness	41
Islamorada	21
Jacksonville	16, 19, 29, 48, 50, 66, 67
Key West	
Site 1	34
Site 2	36
Site 3	58
Lake Worth	66
Lakeland	53
Leesburg	
Site 1	49
Site 2	21
Live Oak	56
Madison	35
Marathon	30
Marianna	66
Melbourne	
Site 1	39
Site 2	46
Miami	
Site 1	16, 18, 31, 32, 38, 44, 47, 52, 53
Site 2	56
Site 3	60
Naples	43, 68
New Smyrna Beach	40
Ocala	39
Orange Park	42
Orlando	
Site 1	30, 31, 36, 61, 62
Site 2	14
Palatka	44
Palm Beach	57
Panama City	
Site 1	22, 51
Site 2	39
Site 3	62
Panama City Beach	64
Pensacola	
Site 1	48, 66, 68
Site 2	40
Sarasota	34

*** SAMPLE TABLE ***

Florida (continued)

Community	ATV Channel Number
St. Petersburg	
Site 1	58, 67
Site 2	48
Tallahassee	
Site 1	17, 45
Site 2	33
Tampa	17, 19, 29, 57, 59, 60
Tequesta	64
Tice	65
Venice	63
West Palm Beach	27, 28, 58, 59

Georgia

Community	ATV Channel Number
Albany	19, 52
Athens	
Site 1	22
Site 2	49
Atlanta	15, 26, 39, 42, 43, 47, 52, 65, 67
Augusta	23, 48, 62, 66
Bainbridge	23
Baxley	51
Brunswick	54
Chatsworth	50
Cochran	33
Columbus	
Site 1	48, 59
Site 2	61, 62
Site 3	56
Cordele	68
Dalton	29
Dawson	21
Macon	16, 35, 45, 53
Monroe	19
Pelham	42
Perry	50
Rome	33
Savannah	
Site 1	15, 56, 65
Site 2	32
Thomasville	65
Toccoa	60
Valdosta	26
Vidalia	38
Waycross	62
Wrens	44

*** SAMPLE TABLE ***

Hawaii

Community	ATV Channel Number
Hilo	19, 22, 23, 25, 44, 52, 60, 69
Honolulu	
Site 1	16, 31, 40, 43, 45, 47, 60, 63, 69
Site 2	19, 52
Site 3	23
Kailua Kona	17
Lihue	29, 36, 42, 50
Wailuku	
Site 1	30, 35, 54, 59, 68
Site 2	41, 51, 64

Iowa

Community	ATV Channel Number
Ames	
Site 1	65
Site 2	67
Burlington	60
Cedar Rapids	
Site 1	16, 55
Site 2	49, 59
Council Bluffs	38
Davenport	
Site 1	29, 38
Site 2	34
Decorah	17
Des Moines	
Site 1	19, 23, 35, 50, 52
Site 2	27
Dubuque	65
Fort Dodge	40
High Point	20
Iowa City	45
Keokuk	68
Keosauqua	53
Lansing	66
Mason City	38, 62
Mount Ayr	46
Newton	41
Ottumwa	21, 42
Red Oak	30
Rock Rapids	45
Sibley	29
Sioux City	48, 51, 56, 57
Spirit Lake	18

*** SAMPLE TABLE ***

Iowa (continued)

Community	ATV Channel Number
Waterloo	
Site 1	43, 61
Site 2	30

Idaho

Community	ATV Channel Number
Boise	36, 43, 54
Burley	31
Caldwell	38
Coeur d'Alene	45
Filer	24
Grangeville	27
Idaho Falls	
Site 1	23, 42
Site 2	50
Lewiston	21
Moscow	50
Nampa	22, 67
Pocatello	
Site 1	32
Site 2	40
Preston	44
Sandpoint	40
Twin Falls	16, 21, 61
Weiser	28

Illinois

Community	ATV Channel Number
Aurora	47
Bloomington	28
Carbondale	53
Champaign	
Site 1	39
Site 2	58
Charleston	21
Chicago	21, 25, 27, 29, 31, 33, 48, 51, 65, 69
Decatur	32, 67
East St. Louis	44
Edwardsville	34
Freeport	64
Harrisburg	43
Jacksonville	62
Joliet	53
LaSalle	52

*** SAMPLE TABLE ***

Illinois (continued)

Community	ATV Channel Number
Macomb	33
Marion	62
Moline	
Site 1	66
Site 2	50
Mount Vernon	69
Olney	33
Peoria	
Site 1	30, 40, 46, 61
Site 2	63
Quincy	52, 57, 58
Rock Island	69
Rockford	42, 54, 67
Springfield	42, 56, 64
Urbana	
Site 1	54
Site 2	45

Indiana

Community	ATV Channel Number
Angola	25
Bloomington	
Site 1	28, 46, 56
Site 2	36
Elkhart	58
Evansville	
Site 1	26, 52, 61
Site 2	54, 55
Fort Wayne	19, 38, 50, 54, 60
Gary	
Site 1	68
Site 2	57
Hammond	41
Indianapolis	
Site 1	25, 26, 44, 52, 53, 61
Site 2	34
Kokomo	67
Lafayette	64
Marion	32
Muncie	17
Richmond	66
Salem	65
South Bend	30, 36, 42, 45
Terre Haute	24, 48, 60
Vincennes	66

*** SAMPLE TABLE ***

Kansas

Community	ATV Channel Number
Chanute	43
Colby	40
Dodge City	28
Ensign	53
Fort Scott	22
Garden City	
Site 1	15, 64
Site 2	60
Goodland	36
Great Bend	47
Hays	
Site 1	63
Site 2	61
Hutchinson	54, 56
Lakin	34
Lawrence	67
Manhattan	45
Parsons	60
Phillipsburg	39
Pittsburg	34
Pratt	36
Salina	25
Topeka	
Site 1	51, 61
Site 2	23
Site 3	58
Wichita	
Site 1	14, 16, 39, 41
Site 2	29, 48

Kentucky

Community	ATV Channel Number
Ashland	
Site 1	69
Site 2	45
Beattyville	14
Bowling Green	
Site 1	42, 48
Site 2	64
Site 3	38
Campbellsville	69
Covington	29
Danville	63
Elizabethtown	57
Harlan	32
Hazard	53, 55
Hopkinsville	56

*** SAMPLE TABLE ***

Kentucky (continued)

Community	ATV Channel Number
Lexington	
Site 1	17, 20, 26
Site 2	59
Louisville	
Site 1	16, 45, 49, 50, 67
Site 2	62
Site 3	35
Madisonville	
Site 1	20
Site 2	59
Morehead	
Site 1	40
Site 2	34
Murray	67
Newport	33
Owensboro	47
Owenton	24
Paducah	
Site 1	38, 60
Site 2	45
Pikeville	28
Somerset	25

Louisiana

Community	ATV Channel Number
Alexandria	
Site 1	22, 50
Site 2	57
Baton Rouge	21, 46, 56, 64, 66
Columbia	19
Hammond	68
Lafayette	
Site 1	23, 53
Site 2	16
Site 3	67
Lake Charles	
Site 1	38, 63
Site 2	58
Monroe	41, 43
New Orleans	
Site 1	14, 18, 30, 40, 41, 59
Site 2	34, 35, 69
Shreveport	
Site 1	28, 35, 60
Site 2	20, 62
Slidell	53

*** SAMPLE TABLE ***

Louisiana (continued)

Community	ATV Channel Number
West Monroe	
Site 1	47
Site 2	36

Massachussetts

Community	ATV Channel Number
Adams	68
Boston	
Site 1	39, 43, 49, 54, 55, 65, 67
Site 2	59
Cambridge	8
Lawrence	30
Marlborough	23
New Bedford	
Site 1	51
Site 2	21
Norwell	61
Springfield	
Site 1	42, 58
Site 2	11
Vineyard Haven	57
Worcester	
Site 1	33
Site 2	47

Maryland

Community	ATV Channel Number
Annapolis	63
Baltimore	
Site 1	38, 39, 41, 44
Site 2	23, 69
Site 3	52
Frederick	65
Hagerstown	
Site 1	46, 51
Site 2	55
Oakland	58
Salisbury	
Site 1	25, 60
Site 2	51

*** SAMPLE TABLE ***

Maine

Community	ATV Channel Number
Augusta	27
Bangor	
Site 1	36, 61
Site 2	69
Biddeford	24
Calais	66
Fort Kent	67
Houlton	15
Lewiston	57
Millinocket	22
Orono	60
Poland Spring	64
Portland	
Site 1	29
Site 2	48
Site 3	58
Presque Isle	
Site 1	64
Site 2	58

Michigan

Community	ATV Channel Number
Alpena	
Site 1	59
Site 2	67
Ann Arbor	33
Bad Axe	36
Battle Creek	
Site 1	29
Site 2	32
Bay City	30
Cadillac	44, 50, 63
Calumet	
Site 1	27
Site 2	62
Cheboygan	39
Detroit	
Site 1	21, 41, 44, 45, 57, 58
Site 2	46
East Lansing	55
Escanaba	30
Flint	
Site 1	40, 69
Site 2	52

*** SAMPLE TABLE ***

Michigan (continued)

Community	ATV Channel Number
Grand Rapids	
Site 1	62, 67
Site 2	56
Site 3	60
Iron Mountain	24, 41
Ironwood	52
Jackson	68
Kalamazoo	
Site 1	20, 26
Site 2	24
Lansing	
Site 1	16
Site 2	59
Site 3	51
Manistee	31
Manistique	60
Marquette	39, 44, 47
Mount Clemens	39
Mount Pleasant	42
Muskegon	39
Onondaga	48
Petoskey	47
Saginaw	
Site 1	61
Site 2	65
Sault Ste. Marie	
Site 1	56, 68
Site 2	58
Traverse City	
Site 1	24
Site 2	57
University Center	22
Vanderbilt	62

Minnesota

Community	ATV Channel Number
Alexandria	24, 56
Appleton	47
Austin	
Site 1	51
Site 2	68
Bemidji	35
Brainerd	65
Duluth	19, 39, 55, 62
Ely	68
Fairmont	32
Hibbing	30, 45

*** SAMPLE TABLE ***

Minnesota (continued)

Community	ATV Channel Number
Mankato	26
Marshall	69
Minneapolis	
Site 1	36, 57, 59, 61, 64
Site 2	14
Redwood Falls	54
Rochester	
Site 1	44
Site 2	60
St. Cloud	
Site 1	58
Site 2	67
St. Paul	16, 30, 33
Thief River Falls	
Site 1	43
Site 2	57
Walker	
Site 1	20
Site 2	28
Worthington	60

Missouri

Community	ATV Channel Number
Bowling Green	38
Cape Girardeau	57, 68
Carrollton	45
Columbia	
Site 1	56, 67
Site 2	15
Flat River	32
Hannibal	41
Jefferson City	
Site 1	29, 49
Site 2	51
Joplin	46, 48, 64
Kansas City	
Site 1	14, 28, 30, 40, 42, 53, 55, 59
Site 2	36
Kirksville	31
Poplar Bluff	18
Sedalia	47
Springfield	42, 52, 55, 57, 61
St. Joseph	
Site 1	35, 48
Site 2	44

*** SAMPLE TABLE ***

Missouri (continued)

Community	ATV Channel Number
St. Louis	
Site 1	28, 40, 54, 63, 65
Site 2	39
Site 3	59

Mississippi

Community	ATV Channel Number
Biloxi	
Site 1	65
Site 2	60
Booneville	57
Bude	55
Columbus	44
Greenville	52
Greenwood	33, 66
Gulfport	57
Hattiesburg	47
Holly Springs	35
Jackson	
Site 1	32, 38, 69
Site 2	58, 61, 67
Laurel	52
McComb	42
Meridian	
Site 1	43, 54, 56
Site 2	20
Mississippi State	59
Natchez	45
Oxford	55
Senatobia	60
Tupelo	39
Vicksburg	49
West Point	31

Montana

Community	ATV Channel Number
Billings	18, 24, 30, 35, 63
Bozeman	
Site 1	53
Site 2	59
Butte	42, 45, 55, 58
Cut Bank	40
Dillon	68
Glendive	49

*** SAMPLE TABLE ***

Montana (continued)

Community	ATV Channel Number
Great Falls	
Site 1	38, 52, 57
Site 2	69
Hardin	60
Havre	48
Helena	
Site 1	27
Site 2	62
Kalispell	
Site 1	56
Site 2	67
Lewistown	45
Miles City	16, 61
Missoula	
Site 1	28, 30, 41
Site 2	15
Wolf Point	29

North Carolina

Community	ATV Channel Number
Asheville	
Site 1	31, 41
Site 2	66
Site 3	20
Belmont	28
Burlington	31
Chapel Hill	43
Charlotte	
Site 1	32, 44, 60
Site 2	47, 67
Columbia	61
Concord	65
Durham	27, 69
Fayetteville	
Site 1	52
Site 2	66
Goldsboro	54
Greensboro	
Site 1	56, 57
Site 2	35
Greenville	
Site 1	41
Site 2	60
Site 3	51
Site 4	45
Hickory	69

*** SAMPLE TABLE ***

North Carolina (continued)

Community	ATV Channel Number
High Point	68
Jacksonville	55
Kannapolis	51
Lexington	19
Linville	59
Morehead City	31
Morganton	34
New Bern	18
Raleigh	
Site 1	34, 59
Site 2	67
Roanoke Rapids	42
Rocky Mount	64
Washington	21
Wilmington	
Site 1	49, 58, 65
Site 2	46
Wilson	32
Winston-Salem	29, 33, 41

North Dakota

Community	ATV Channel Number
Bismarck	32, 51, 54, 66
Devils Lake	
Site 1	26
Site 2	52
Dickinson	
Site 1	33, 47
Site 2	18
Ellendale	36
Fargo	
Site 1	27, 53
Site 2	33
Site 3	63
Grand Forks	55
Jamestown	25, 47
Minot	
Site 1	24, 42, 63
Site 2	40
Pembina	56
Valley City	62
Williston	
Site 1	50, 64, 69
Site 2	16

*** SAMPLE TABLE ***

Nebraska

Community	ATV Channel Number
Albion	
Site 1	25
Site 2	40
Alliance	50
Bassett	22
Grand Island	
Site 1	57
Site 2	27
Hastings	
Site 1	36
Site 2	31
Hayes Center	47
Kearney	41
Lexington	51
Lincoln	
Site 1	68
Site 2	65
McCook	62
Merriman	20
Norfolk	46
North Platte	
Site 1	53
Site 2	30
Omaha	
Site 1	18, 55, 58, 62, 64
Site 2	24, 28
Pawnee City	69
Scottsbluff	
Site 1	45
Site 2	17
Superior	46

New Hampshire

Community	ATV Channel Number
Berlin	17
Concord	45
Derry	20
Durham	34
Keene	53
Littleton	43
Manchester	69
Merrimack	18

*** SAMPLE TABLE ***

New Jersey

Community	ATV Channel Number
Atlantic City	
Site 1	43
Site 2	50
Burlington	55
Camden	66
Linden	44
Montclair	53
New Brunswick	8
Newark	38, 51
Newton	61
Paterson	40
Secaucus	27
Trenton	49
Vineland	22
West Milford	23
Wildwood	31

New Mexico

Community	ATV Channel Number
Alamogordo	34
Albuquerque	20, 43, 45, 47, 52, 53, 60, 61, 62
Carlsbad	
Site 1	31
Site 2	60
Clayton	39
Clovis	58
Farmington	15
Gallup	40, 69
Hobbs	46
Las Cruces	
Site 1	60
Site 2	54
Lovington	16
Portales	33
Raton	29
Roswell	
Site 1	17
Site 2	62
Site 3	52
Santa Fe	
Site 1	30, 57
Site 2	35
Silver City	
Site 1	42
Site 2	47

*** SAMPLE TABLE ***

New Mexico (continued)

Community	ATV Channel Number
Socorro	33
Tucumcari	65

Nevada

Community	ATV Channel Number
Elko	64
Fallon	30
Henderson	69
Las Vegas	19, 24, 32, 34, 56, 63, 68
McGill	62
Paradise	66
Reno	
Site 1	18, 22, 32, 61
Site 2	49, 53
Site 3	59
Tonopah	55
Winnemucca	27

New York

Community	ATV Channel Number
Albany	
Site 1	26, 51
Site 2	64
Amsterdam	56
Batavia	33
Bath	58
Binghamton	29, 32, 49, 50
Buffalo	
Site 1	53, 55, 64
Site 2	38, 45
Site 3	15
Site 4	42
Carthage	23
Corning	69
Elmira	26, 54
Garden City	48
Ilion	31
Ithaca	66
Jamestown	16, 43
Kingston	69
New York	16, 28, 33, 42, 45, 56, 64
North Pole	40
Norwood	66

*** SAMPLE TABLE ***

New York (continued)

Community	ATV Channel Number
Oneonta	59
Plattsburgh	58
Poughkeepsie	36
Riverhead	62
Rochester	39, 56, 59, 61, 62
Schenectady	21, 38, 44
Smithtown	10
Syracuse	
Site 1	30, 47, 57, 63
Site 2	22
Site 3	60
Utica	
Site 1	35
Site 2	53
Site 3	27
Watertown	25, 34

Ohio

Community	ATV Channel Number
Akron	
Site 1	50, 58
Site 2	56
Alliance	36
Athens	27
Bowling Green	61
Cambridge	60
Canton	
Site 1	39
Site 2	41
Chillicothe	63
Cincinnati	31, 39, 47, 55, 60
Cleveland	20, 31, 53, 63, 65
Columbus	
Site 1	21, 32, 46
Site 2	38, 59
Dayton	41, 57, 58, 62, 68
Lima	56, 65
Lorain	47
Mansfield	64
Newark	24
Oxford	51
Portsmouth	49, 50
Sandusky	69
Shaker Heights	34
Springfield	36
Steubenville	48

*** SAMPLE TABLE ***

Ohio (continued)

Community	ATV Channel Number
Toledo	
Site 1	14, 15, 17, 66, 67
Site 2	42
Youngstown	28, 29, 30
Zanesville	54

Oklahoma

Community	ATV Channel Number
Ada	46
Altus	23
Ardmore	
Site 1	56
Site 2	35
Bartlesville	59
Cheyenne	36
Claremore	31
Elk City	56
Enid	19, 50
Eufaula	21
Guymon	23
Hugo	25, 64
Lawton	
Site 1	42
Site 2	40
McAlester	33
Miami	62
Oklahoma City	
Site 1	22, 30, 32, 49, 57, 61, 63, 64, 68
Site 2	54
Okmulgee	38
Sayre	46
Tulsa	15, 27, 28, 42, 65, 66, 67, 69
Woodward	40

Oregon

Community	ATV Channel Number
Astoria	60
Bend	41, 47, 56
Burns	25
Coos Bay	29, 57
Corvallis	43

*** SAMPLE TABLE ***

Oregon (continued)

Community	ATV Channel Number
Eugene	
Site 1	20, 38
Site 2	59, 60, 67
Grants Pass	
Site 1	33
Site 2	49
Klamath Falls	29, 38, 48
La Grande	62
Medford	
Site 1	51, 52, 68
Site 2	61
Site 3	40
North Bend	58
Portland	14, 27, 44, 46, 50, 52, 64, 66
Roseburg	25, 42, 65
Salem	
Site 1	61
Site 2	18
The Dalles	53

Pennsylvania

Community	ATV Channel Number
Allentown	24, 67
Altoona	34, 61, 63
Bethlehem	18
Clearfield	39
Erie	22, 32, 51, 62, 68
Greensburg	59
Harrisburg	14, 40, 66
Hazleton	31
Johnstown	
Site 1	49, 50
Site 2	67
Lancaster	
Site 1	42
Site 2	58
Philadelphia	26, 30, 32, 34, 46, 54, 59
Pittsburgh	
Site 1	38, 42, 52, 57, 69
Site 2	26
Site 3	64
Reading	62
Red Lion	47

*** SAMPLE TABLE ***

Pennsylvania (continued)

Community	ATV Channel Number
Scranton	
Site 1	2, 7, 13
Site 2	25, 65
State College	32
Wilkes-Barre	41
Williamsport	45
York	64

Puerto Rico

Community	ATV Channel Number
Aguada	65
Aguadilla	17, 23, 63
Arecibo	
Site 1	53
Site 2	69
Bayamon	29
Caguas	31, 57
Carolina	51
Fajardo	39, 55
Guayama	27
Humacao	33
Mayaguez	
Site 1	35, 67
Site 2	28, 45
Naranjito	43
Ponce	
Site 1	10, 19, 25, 47
Site 2	8, 21
San Juan	
Site 1	61, 62, 66
Site 2	15, 49
Site 3	59
San Sebastian	56
Yauco	41

Rhode Island

Community	ATV Channel Number
Block Island	45
Providence	
Site 1	13, 19, 41
Site 2	31

*** SAMPLE TABLE ***

South Carolina

Community	ATV Channel Number
Allendale	69
Anderson	61
Beaufort	47
Charleston	
Site 1	18, 30, 34, 60, 68
Site 2	64
Columbia	
Site 1	17, 39, 52
Site 2	50, 59
Conway	61
Florence	
Site 1	29, 53
Site 2	38
Site 3	45
Greenville	
Site 1	45, 56
Site 2	27
Greenwood	68
Hardeeville	61
Myrtle Beach	56
Rock Hill	
Site 1	22
Site 2	54
Spartanburg	
Site 1	53
Site 2	43
Sumter	
Site 1	31
Site 2	41

South Dakota

Community	ATV Channel Number
Aberdeen	
Site 1	28
Site 2	48
Brookings	65
Eagle Butte	28
Florence	68
Huron	41
Lead	47, 66
Lowry	22
Martin	16
Mitchell	58
Pierre	
Site 1	53
Site 2	42
Rapid City	27, 34, 43, 69

*** SAMPLE TABLE ***

South Dakota (continued)

Community	ATV Channel Number
Reliance	69
Seneca	33
Sioux Falls	
Site 1	42, 67
Site 2	39, 49
Vermillion	35

Tennessee

Community	ATV Channel Number
Athens	40
Chattanooga	35, 56, 59, 62, 68
Cleveland	38
Cookeville	47, 60
Crossville	16
Greeneville	48
Hendersonville	36
Jackson	
Site 1	53
Site 2	22
Site 3	61
Jellico	49
Johnson City	50
Kingsport	25
Knoxville	30, 42, 51, 52, 58, 67
Lebanon	65
Lexington	69
Memphis	
Site 1	28, 46, 54, 56, 63, 64, 68
Site 2	43
Murfreesboro	27
Nashville	
Site 1	43, 63
Site 2	18, 46
Site 3	32, 33
Site 4	55
Sneedville	64

Texas

Community	ATV Channel Number
Abilene	
Site 1	67
Site 2	30
Site 3	28
Alvin	44

*** SAMPLE TABLE ***

Texas (continued)

Community	ATV Channel Number
Amarillo	49, 53, 57, 62, 69
Arlington	43
Austin	21, 31, 33, 49, 57, 59
Baytown	54
Beaumont	
Site 1	46
Site 2	36, 42
Belton	47
Big Spring	65
Blanco	66
Brownsville	63
Bryan	23, 29
Childress	50
College Station	50
Conroe	
Site 1	59
Site 2	65
Corpus Christi	
Site 1	55, 64
Site 2	31, 43, 51
Dallas	14, 19, 31, 45, 48, 61, 65
Decatur	38
Del Rio	18
Denton	30
Eagle Pass	13
El Paso	15, 16, 28, 50, 62, 66, 67, 68
Farwell	56
Fort Worth	
Site 1	18, 20, 67
Site 2	36
Fredericksburg	61
Galveston	
Site 1	47
Site 2	24
Garland	24
Greenville	53
Harlingen	
Site 1	20, 30
Site 2	46
Houston	27, 30, 35, 41, 43, 52, 62, 63, 69
Irving	57
Jacksonville	54
Katy	32
Kerrville	56
Killeen	51
Lake Dallas	41

*** SAMPLE TABLE ***

Texas (continued)

Community	ATV Channel Number
Laredo	
Site 1	15, 54
Site 2	39
Llano	39
Longview	63
Lubbock	22, 40, 44, 51, 54
Lufkin	66
Marshall	49
McAllen	62
Midland	61
Nacogdoches	
Site 1	44
Site 2	21
Odessa	
Site 1	59
Site 2	14, 50
Site 3	30
Site 4	66
Port Arthur	64
Rosenberg	38
San Angelo	
Site 1	21, 23
Site 2	54
San Antonio	
Site 1	30, 32, 38, 44, 48
Site 2	20
Site 3	26
Site 4	68
Sherman	44
Sonora	55
Sweetwater	46
Temple	32
Texarkana	42
Tyler	
Site 1	46
Site 2	59
Victoria	
Site 1	34, 58
Site 2	46
Waco	
Site 1	22, 40, 69
Site 2	35
Weslaco	49
Wichita Falls	
Site 1	59, 60, 66
Site 2	17

*** SAMPLE TABLE ***

Utah

Community	ATV Channel Number
Cedar City	
Site 1	43
Site 2	31
Logan	15
Moab	67
Monticello	52
Ogden	
Site 1	40
Site 2	48
Price	60
Provo	
Site 1	59
Site 2	57
Richfield	28
Salt Lake City	
Site 1	18, 25, 34, 50, 56, 67
Site 2	63
St. George	
Site 1	22
Site 2	40
Vernal	55

Virginia

Community	ATV Channel Number
Arlington	27
Ashland	68
Bristol	24
Charlottesville	
Site 1	45, 67
Site 2	47
Danville	
Site 1	53
Site 2	63
Fairfax	15
Front Royal	21
Goldvein	40
Grundy	63
Hampton	22
Hampton-Norfolk	26
Harrisonburg	33
Lynchburg	
Site 1	25, 60
Site 2	14
Manassas	61
Marion	30
Norfolk	24, 59, 63
Norton	60

*** SAMPLE TABLE ***

Virginia (continued)

Community	ATV Channel Number
Petersburg	31
Portsmouth	39, 50
Richmond	
Site 1	46
Site 2	55, 58, 62
Site 3	52
Roanoke	36, 39, 49, 62, 66
Staunton	69
Virginia Beach	44

Virgin Islands

Community	ATV Channel Number
Charlotte Amalie	32, 44
Christiansted	38

Vermont

Community	ATV Channel Number
Burlington	
Site 1	32, 61, 67
Site 2	15
Hartford	46
Rutland	39
St. Johnsbury	38
Windsor	36

Washington

Community	ATV Channel Number
Bellevue	
Site 1	39
Site 2	65
Bellingham	17, 24
Centralia	26
Everett	25
Kennewick	44
Pasco	20
Pullman	
Site 1	17
Site 2	56
Richland	40, 66
Seattle	
Site 1	41, 53, 61, 62, 67
Site 2	43

*** SAMPLE TABLE ***

Washington (continued)

Community	ATV Channel Number
Spokane	
Site 1	15, 18, 32, 38, 68
Site 2	47
Tacoma	
Site 1	18, 57, 59
Site 2	34
Site 3	31
Vancouver	58
Wenatchee	
Site 1	48
Site 2	54
Yakima	36, 60, 63, 68

Wisconsin

Community	ATV Channel Number
Appleton	65
Chippewa Falls	49
Eau Claire	
Site 1	35
Site 2	58
Fond du Lac	50
Green Bay	25, 51, 66, 67, 69
Highland	33
Janesville	56
Kenosha	40
Kieler	58
La Crosse	
Site 1	34, 53, 63
Site 2	69
Madison	20, 35, 44, 60, 62
Manitowoc	48
Mayville	41
Menomonie	56
Milwaukee	19, 22, 28, 34, 43, 45, 46, 59, 61
Park Falls	65
Racine	63
Rhinelander	29
Sturgeon Bay	54
Superior	27
Suring	23
Wausau	33, 43, 64

*** SAMPLE TABLE ***

West Virginia

Community	ATV Channel Number
Bluefield	
Site 1	58
Site 2	43
Charleston	
Site 1	41, 48, 64
Site 2	26
Clarksburg	32, 43
Grandview	65
Huntington	16, 56, 66
Keyser	54
Lewisburg	55
Martinsburg	28
Morgantown	66
Oak Hill	31
Parkersburg	35, 47
Weston	63
Wheeling	62

Wyoming

Community	ATV Channel Number
Casper	
Site 1	39, 50, 65
Site 2	61
Cheyenne	
Site 1	16, 29
Site 2	60
Site 3	52
Jackson	14
Lander	
Site 1	52
Site 2	42
Laramie	54
Rawlins	35
Riverton	27
Rock Springs	53
Sheridan	17, 49, 62

Section II - Close Assignments

This table identifies proposed ATV allotments set forth in the draft Table that are: 1) closer than 125 miles to co-channel ATV allotments; 2) closer than 115 miles to existing co-channel stations; and, 3) between 5 and 55 miles of adjacent-channel stations.

		Close Assignments					
		ATV-ATV		ATV-NTSC			
		Co-channel		Co-channel		Adjacent-channel	
City	ATV Channel	Number	Nearest (miles)	Number	Nearest (miles)	Number in range: < 55 miles	Number in range: 5 to 55 miles
AL BIRMINGHAM	63	0		0		1	0
AL BIRMINGHAM	69	0		0		1	0
AL DEMOPOLIS	62	0		1	100.9	0	0
AL HUNTSVILLE	49	0		0		1	0
AL TUSCALOOSA	61	0		0		1	1
AR LITTLE ROCK	30	0		1	110.8	0	0
AR PINE BLUFF	21	0		0		1	1
AZ FLAGSTAFF	22	0		1	113.5	0	0
AZ GREEN VALLEY	39	0		1	100.6	1	0
AZ PHOENIX	52	0		0		1	0
CA ANAHEIM	53	0		0		1	1
CA AVALON	64	0		1	106.8	0	0
CA BAKERSFIELD	27	0		1	110.5	1	1
CA BARSTOW	41	0		0		1	1
CA CERES	22	0		1	103.3	0	0
CA CONCORD	43	0		0		1	1
CA COTATI	23	0		1	103.3	0	0
CA HUNTINGTON BEACH	39	0		2	106.3	1	1
CA HUNTINGTON BEACH	39: 19 miles from adjacent ATV channel 38, Los Angeles						
CA LOS ANGELES	8	0		1	107.3	1	0
CA LOS ANGELES	25	1	107.3	0		1	1
CA LOS ANGELES	31	0		1	112.7	1	1

		Close Assignments					
		ATV-ATV		ATV-NTSC			
		Co-channel		Co-channel		Adjacent-channel	
City	ATV Channel	Number	Nearest (miles)	Number	Nearest (miles)	Number in range: < 55 miles	Number in range: 5 to 55 miles
CA LOS ANGELES	35	0		0		1	0
CA LOS ANGELES	38	0		1	111.0	0	0
CA LOS ANGELES	38: 19 miles from adj ATV channel 39, Huntington Beach						
CA LOS ANGELES	47	0		0		1	0
CA LOS ANGELES	65	1	124.8	0		1	1
CA LOS ANGELES	69	0		0		1	0
CA MODESTO	50	0		1	111.0	0	0
CA MONTEREY	31	0		1	104.6	0	0
CA NOVATO	19	0		1	102.5	1	1
CA OAKLAND	45	0		0		1	0
CA ONTARIO	10	0		1	107.3	2	0
CA PALM SPRINGS	68	0		1	97.6	0	0
CA PORTERVILLE	50	0		0		1	0
CA RIVERSIDE	15	0		1	112.5	0	0
CA RIVERSIDE	15: adjacent to LM channels 14 and 16 in Los Angeles						
CA SACRAMENTO	14	0		1	108.5	0	0
CA SACRAMENTO	24	0		0		1	1
CA SACRAMENTO	25	0		1	103.4	0	0
CA SACRAMENTO	35	0		1	105.1	1	1
CA SACRAMENTO	55	0		0		1	1
CA SACRAMENTO	47	0		0		1	1
CA SALINAS	58	0		1	102.9	0	0
CA SAN BERNARDINO	19	0		0		1	1
CA SAN BERNARDINO	19: adjacent to LM channel 20 in Los Angeles						
CA SAN BERNARDINO	55	1	112.5	0		1	0
CA SAN DIEGO	9	0		0		2	2
CA SAN DIEGO	16	0		0		1	1
CA SAN DIEGO	16: co-channel conflict with LM in Los Angeles						
CA SAN DIEGO	25	1	107.3	0		0	0
CA SAN DIEGO	55	1	112.5	0		0	0

City	ATV Channel	Close Assignments: ATV-ATV Co-channel Number	ATV-ATV Co-channel Nearest (miles)	ATV-NTSC Co-channel Number	ATV-NTSC Co-channel Nearest (miles)	ATV-NTSC Adjacent-channel Number in range: < 55 miles	ATV-NTSC Adjacent-channel Number in range: 5 to 55 miles
CA SAN DIEGO	55	requires negotiation with Mexico: 2 short-spacings					
CA SAN DIEGO	63	0		0		0	0
CA SAN DIEGO	63	requires negotiation with Mexico: one short-spacing					
CA SAN DIEGO	65	1	124.8	0		0	0
CA SAN DIEGO	65	requires negotiation with Mexico: one short-spacing					
CA SAN FRANCISCO	21	0		0		2	1
CA SAN FRANCISCO	27	0		0		1	0
CA SAN FRANCISCO	29	0		1	106.4	0	0
CA SAN FRANCISCO	39	0		0		1	0
CA SAN FRANCISCO	61	0		0		1	0
CA SAN JOSE	12	0		0		1	0
CA SAN JOSE	49	0		0		1	0
CA SAN JOSE	53	0		0		2	1
CA SAN JOSE	63	0		0		1	1
CA SANTA ANA	61	0		0		1	1
CA STOCKTON	41	0		0		2	1
CA STOCKTON	46	0		1	105.1	0	0
CA STOCKTON	67	0		1	102.9	0	0
CA TWENTYNINE PALMS	46	0		1	112.9	0	0
CA VALLEJO	33	0		0		1	0
CA VISALIA	62	0		0		1	0
CA WATSONVILLE	40	0		1	105.1	0	0
CO COLORADO SPRINGS	16	0		1	104.2	0	0
CO DENVER	17	0		1	100.1	0	0
CO DENVER	30	0		0		1	0
CT BRIDGEPORT	12	0		1	107.6	2	2
CT BRIDGEPORT	39	1	118.5	0		0	0
CT HARTFORD	29	0		0		1	1
CT HARTFORD	63	0		1	107.7	0	0
CT NEW HAVEN	17	0		1	107.1	1	1

City	ATV Channel	Close Assignments: ATV-ATV Co-channel Number	ATV-ATV Co-channel Nearest (miles)	ATV-NTSC Co-channel Number	ATV-NTSC Co-channel Nearest (miles)	ATV-NTSC Adjacent-channel Number in range: < 55 miles	ATV-NTSC Adjacent-channel Number in range: 5 to 55 miles
CT NEW HAVEN	52	0		0		1	1
CT NEW LONDON	50	0		2	100.5	1	1
CT NORWICH	9	0		2	105.9	2	2
CT WATERBURY	60	0		0		2	2
DC WASHINGTON	29	0		1	104.5	0	0
DC WASHINGTON	30	0		1	111.8	0	0
DC WASHINGTON	35	0		1	106.1	0	0
DC WASHINGTON	36	1	124.6	0		0	0
DC WASHINGTON	57	0		1	104.3	1	1
DE WILMINGTON	36	1	124.6	0		1	0
DE WILMINGTON	68	0		1	101.1	0	0
FL BOCA RATON	50	0		0		1	0
FL CLERMONT	23	0		0		1	0
FL DAYTONA BEACH	54	0		0		1	0
FL FORT LAUDERDALE	40	0		0		1	0
FL JACKSONVILLE	29	0		0		1	0
FL JACKSONVILLE	48	0		0		1	0
FL MIAMI	44	0		0		1	0
FL MIAMI	16	0		1	102.7	1	0
FL MIAMI	18	0		0		1	0
FL MIAMI	32	0		0		1	0
FL MIAMI	38	0		0		1	0
FL MIAMI	52	0		0		1	0
FL ORLANDO	36	0		0		1	0
FL ST. PETERSBURG	67	0		0		1	0
FL TAMPA	17	0		0		1	0
FL WEST PALM BEACH	28	0		0		1	0
HI HONOLULU	19	0		0		1	0
HI HONOLULU	43	0		0		1	0
HI HONOLULU	45	0		0		1	0

City	ATV Channel	Close Assignments: ATV-ATV Co-channel Number	ATV-ATV Co-channel Nearest (miles)	ATV-NTSC Co-channel Number	ATV-NTSC Co-channel Nearest (miles)	ATV-NTSC Adjacent-channel Number in range: < 55 miles	ATV-NTSC Adjacent-channel Number in range: 5 to 55 miles
IA CEDAR RAPIDS	49	0		0		1	0
IA DES MOINES	35	0		0		1	1
IA MASON CITY	38	0		1	114.8	0	0
IA WATERLOO	43	0		1	104.2	0	0
ID POCATELLO	32	0		0		1	1
ID TWIN FALLS	16	0		0		1	1
IL CHICAGO	21	0		0		1	0
IL CHICAGO	25	0		0		1	0
IL CHICAGO	27	0		1	111.2	1	0
IL CHICAGO	31	0		0		1	0
IL CHICAGO	33	0		0		1	0
IL CHICAGO	51	0		0		1	0
IL CHICAGO	65	0		0		1	0
IL MACOMB	33	0		1	100.1	0	0
IL PEORIA	30	0		0		1	0
IL PEORIA	46	0		0		1	0
IL SPRINGFIELD	56	0		0		1	0
IN EVANSVILLE	26	0		0		1	0
IN FORT WAYNE	38	0		0		1	0
IN FORT WAYNE	54	0		0		1	0
KS LAWRENCE	67	0		0		1	1
KS WICHITA	14	0		0		1	1
KS WICHITA	16	0		0		1	1
KS WICHITA	41	0		0		1	1
KY LEXINGTON	17	0		0		1	0
KY LEXINGTON	26	0		0		1	0
KY LOUISVILLE	67	0		0		1	0
LA LAFAYETTE	23	0		0		1	0
MA ADAMS	68	0		1	109.0	0	0
MA BOSTON	39	1	118.5	0		1	0

		Close Assignments					
		ATV-ATV		ATV-NTSC			
		Co-channel		Co-channel		Adjacent-channel	
						Number in range:	
City	ATV Channel	Num-ber	Nearest (miles)	Num-ber	Nearest (miles)	< 55 miles	5 to 55 miles
MA BOSTON	43	0		0		1	0
MA BOSTON	49	0		0		2	2
MA BOSTON	55	0		0		1	0
MA BOSTON	59	0		1	110.1	2	2
MA BOSTON	65	0		1	110.7	2	2
MA BOSTON	67	0		0		2	2
MA CAMBRIDGE	8	0		1	108.7	2	1
MA NEW BEDFORD	21	0		1	110.4	0	0
MA NORWELL	61	0		1	107.3	1	1
MA SPRINGFIELD	11	0		1	107.8	0	0
MA SPRINGFIELD	58	0		0		1	0
MD ANNAPOLIS	63	0		0		2	2
MD BALTIMORE	23	0		1	107.5	2	1
MD BALTIMORE	39	0		1	107.3	0	0
MD BALTIMORE	44	0		0		2	1
MD BALTIMORE	69	0		1	113.3	0	0
MD FREDERICK	65	0		0		1	1
MI ANN ARBOR	33	0		1	105.8	1	1
MI DETROIT	41	0		1	114.2	1	1
MI DETROIT	21	0		0		2	1
MI EAST LANSING	55	0		0		1	1
MI FLINT	52	0		1	109.9	0	0
MI KALAMAZOO	20	0		1	114.7	0	0
MI LANSING	16	0		1	114.3	1	1
MI LANSING	16: co-channel conflict with LM in Detroit (72 miles)						
MI LANSING	16: adjacent to LM channel 15 in Detroit						
MI LANSING	51	0		0		1	1
MI ONONDAGA	48	0		0		1	0
MI SAGINAW	65	0		0		1	0
MI TRAVERSE CITY	24	0		0		1	1

City	ATV Channel	Close Assignments: ATV-ATV Co-channel Number	ATV-ATV Co-channel Nearest (miles)	ATV-NTSC Co-channel Number	ATV-NTSC Co-channel Nearest (miles)	ATV-NTSC Adjacent-channel Number in range: < 55 miles	ATV-NTSC Adjacent-channel Number in range: 5 to 55 miles
MN ALEXANDRIA	24	0		0		1	1
MN DULUTH	19	0		0		1	1
MN ST. PAUL	16	0		0		1	0
MN ST. PAUL	30	0		0		1	0
MO KANSAS CITY	30	0		1	107.3	0	0
MO KANSAS CITY	40	0		0		1	0
MO KANSAS CITY	42	0		0		1	0
MS HOLLY SPRINGS	35	0		0		1	1
NC CHARLOTTE	47	0		0		1	0
NC CONCORD	65	0		0		1	0
NC DURHAM	27	0		0		1	0
NC NEW BERN	18	0		0		1	0
NE OMAHA	55	0		0		1	0
NE SCOTTSBLUFF	17	0		1	109.5	0	0
NH DERRY	20	0		0		1	1
NH KEENE	53	0		1	105.6	0	0
NH MANCHESTER	69	0		0		1	1
NH MERRIMACK	18	0		1	104.6	0	0
NJ ATLANTIC CITY	50	0		1	103.9	0	0
NJ CAMDEN	66	1	119.6	1	102.5	1	0
NJ LINDEN	44	0		1	103.1	0	0
NJ MONTCLAIR	53	0		1	103.9	1	1
NJ NEW BRUNSWICK	8	0		1	98.8	2	2
NJ NEWARK	38	0		1	103.2	0	0
NJ NEWARK	51	0		1	104.9	2	2
NJ NEWTON	61	0		2	98.6	1	1
NJ TRENTON	49	0		2	104.3	2	2
NJ VINELAND	22	0		2	107.7	1	0
NJ WEST MILFORD	23	0		2	102.5	0	0
NV LAS VEGAS	32	0		0		1	0

City	ATV Channel	Close Assignments: ATV-ATV Co-channel Number	ATV-ATV Co-channel Nearest (miles)	ATV-NTSC Co-channel Number	ATV-NTSC Co-channel Nearest (miles)	ATV-NTSC Adjacent-channel Number in range: < 55 miles	ATV-NTSC Adjacent-channel Number in range: 5 to 55 miles
NV LAS VEGAS	34	0		0		1	0
NY GARDEN CITY	48	0		2	108.1	2	2
NY NEW YORK	16	0		1	103.1	0	0
NY NEW YORK	16: adjacent to LM channel 15 in New York						
NY NEW YORK	28	0		1	102.9	0	0
NY NEW YORK	42	0		0		1	0
NY NEW YORK	56	0		1	111.5	1	1
NY NEW YORK	64	0		1	105.5	1	1
NY RIVERHEAD	62	0		2	103.0	1	1
NY SMITHTOWN	10	0		1	110.3	2	2
OH CINCINNATI	55	0		0		1	1
OH CLEVELAND	20	0		1	113.0	1	0
OH CLEVELAND	53	0		2	108.1	1	1
OH DAYTON	68	0		1	112.8	0	0
OH SHAKER HEIGHTS	34	0		2	107.1	1	1
OH SPRINGFIELD	36	0		0		1	1
OH TOLEDO	14	0		0		0	0
OH TOLEDO	14: co-channel conflict with LM in Cleveland (90 miles)						
OH TOLEDO	14: adjacent to LM channel 15 in Cleveland						
OH TOLEDO	14: adjacent to LM channel 15 in Detroit						
OH TOLEDO	15	0		1	103.3	0	0
OH TOLEDO	15: co-channel conflict with LM in Detroit (50 miles)						
OH TOLEDO	15: adjacent to LM channel 16 in Detroit						
OH TOLEDO	15: adjacent to LM channel 14 in Cleveland						
OH TOLEDO	66	0		1	113.2	0	0
OH TOLEDO	17	0		2	104.0	0	0
OH TOLEDO	17: adjacent to LM channel 16 in Detroit						
OH YOUNGSTOWN	28	0		0		1	0
OK OKLAHOMA CITY	32	0		1	107.5	0	0
OK OKLAHOMA CITY	61	0		0		1	0

City	ATV Channel	Close Assignments: ATV-ATV Co-channel Number	ATV-ATV Co-channel Nearest (miles)	ATV-NTSC Co-channel Number	ATV-NTSC Co-channel Nearest (miles)	ATV-NTSC Adjacent-channel Number in range: < 55 miles	ATV-NTSC Adjacent-channel Number in range: 5 to 55 miles
OK OKLAHOMA CITY	63	0		0		1	0
OK TULSA	42	0		0		1	0
OR PORTLAND	50	0		0		1	0
PA ALLENTOWN	24	0		1	113.3	0	0
PA ALLENTOWN	67	0		1	105.5	0	0
PA BETHLEHEM	18	0		0		1	1
PA BETHLEHEM	18: adjacent to LM channel 19 in Philadelphia						
PA ERIE	22	0		1	113.8	0	0
PA GREENSBURG	59	0		1	105.5	0	0
PA HARRISBURG	14	0		1	103.8	1	1
PA HARRISBURG	40	1	123.0	0		0	0
PA HARRISBURG	66	1	119.6	1	108.0	0	0
PA HAZLETON	31	0		1	111.5	0	0
PA LANCASTER	42	0		0		1	1
PA PHILADELPHIA	30	0		0		1	0
PA PHILADELPHIA	34	0		0		1	0
PA PHILADELPHIA	54	0		1	97.1	0	0
PA PHILADELPHIA	59	0		0		2	2
PA READING	62	0		2	101.3	1	1
PA RED LION	47	0		2	107.6	0	0
PA SCRANTON	2	0		1	103.1	0	0
PA SCRANTON	7	0		1	103.1	0	0
PA SCRANTON	13	0		1	103.2	0	0
PA SCRANTON	25	0		1	105.6	0	0
PA WILKES-BARRE	41	0		1	102.9	0	0
PA YORK	64	0		2	108.1	0	0
PR AGUADILLA	17	0		0		1	0
PR AGUADILLA	23	0		0		1	0
PR ARECIBO	53	0		0		1	1
PR BAYAMON	29	0		0		1	0

		Close Assignments					
		ATV-ATV		ATV-NTSC			
		Co-channel		Co-channel		Adjacent-channel	
City	ATV Channel	Number	Nearest (miles)	Number	Nearest (miles)	Number in range: < 55 miles	5 to 55 miles
PR CAGUAS	31	0		0		1	0
PR CAGUAS	57	0		0		1	0
PR MAYAGUEZ	35	0		0		1	1
PR MAYAGUEZ	45	0		0		1	0
PR NARANJITO	43	0		0		1	1
PR PONCE	8	0		0		1	0
PR PONCE	10	0		0		2	2
PR PONCE	21	0		0		2	2
PR PONCE	25	0		0		1	0
PR SAN JUAN	59	0		0		2	1
PR SAN JUAN	61	0		0		1	1
PR YAUCO	41	0		0		1	1
RI PROVIDENCE	19	0		1	110.9	0	0
TN CHATTANOOGA	62	0		0		1	0
TN KNOXVILLE	42	0		0		1	0
TX ALVIN	44	0		0		1	0
TX BROWNSVILLE	63: 14 miles from adjacent ATV channel 62 McAllen, TX						
TX DALLAS	48	0		0		1	0
TX EAGLE PASS	13	0		1	102.0	0	0
TX EL PASO	15	0		0		1	0
TX EL PASO	15 requires negotiation with Mexico: one short-spacing						
TX EL PASO	16	0		0		0	0
TX EL PASO	16 requires negotiation with Mexico: one short-spacing						
TX EL PASO	28	0		0		0	0
TX EL PASO	28 requires negotiation with Mexico: 2 short-spacings						
TX EL PASO	66	0		0		1	0
TX FORT WORTH	67	0		0		1	0
TX HOUSTON	27	0		0		1	0
TX HOUSTON	52	0		0		1	0
TX HOUSTON	62	0		0		1	0

		Close Assignments					
		ATV-ATV		ATV-NTSC			
		Co-channel		Co-channel		Adjacent-channel	
City	ATV Channel	Number	Nearest (miles)	Number	Nearest (miles)	Number in range: < 55 miles	5 to 55 miles
TX IRVING	57	0		0		1	0
TX LAREDO	54	0		0		0	0
TX LAREDO	54 requires negotiation with Mexico:					2 short-spacings	
TX MCALLEN	62	0		0		0	0
TX MCALLEN	62 requires negotiation with Mexico:					2 short-spacings	
TX MCALLEN	62: 14 miles from adj. ATV channel 63, Brownsville, TX						
TX ROSENBERG	38	0		0		1	0
TX VICTORIA	46	0		0		1	1
TX WESLACO	49	0		0		1	1
TX WESLACO	49 requires negotiation with Mexico:					2 short-spacings	
UT SALT LAKE CITY	25	0		0		1	1
VA ARLINGTON	27	0		1	101.1	1	1
VA DANVILLE	53	0		0		1	1
VA FAIRFAX	15	0		1	104.6	1	0
VA GOLDVEIN	40	1	123.0	0		0	0
VA HAMPTON-NORFOLK	26	0		0		1	0
VA LYNCHBURG	14	0		0		1	1
VA MANASSAS	61	0		0		1	1
VA PORTSMOUTH	50	0		0		1	0
VA ROANOKE	39	0		0		1	0
WA TACOMA	34	0		0		1	0
WA TACOMA	57	0		0		1	0
WA YAKIMA	36	0		0		1	0
WI GREEN BAY	25	0		0		1	0
WI MADISON	20	0		0		1	0
WI MILWAUKEE	19	0		0		1	0
WI MILWAUKEE	59	0		0		1	0
WY CHEYENNE	16	0		0		1	1

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